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In the Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MERCY HOSPITAL ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is reported at 606 F.2d 22. The Board's decision and order (App. C, *infra*, 16a-28a) are reported at 238 N.L.R.B. No. 145. The Regional Director's decision and direction of election in the related representation proceeding (App. D, *infra*, 29a-41a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 14a-15a) was entered on September 4, 1979. On December 4, 1979, Mr. Justice Marshall extended the time for filing a petition until January 2, 1980. On January 10, 1980, Mr. Justice Marshall further extended the time for filing to and including February 1, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 1974 Health Care Amendments to the National Labor Relations Act permit the Board to apply traditional community of interest criteria in determining appropriate bargaining units in the health care industry, provided the Board's determinations are consistent with the congressional admonition to avoid undue proliferation of bargaining units in health care institutions.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151, *et seq.*), are as follows:

> Section 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *

> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:
>
> * * *
>
> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *.

STATEMENT

1. In 1974, Congress extended the coverage of the National Labor Relations Act to previously exempt nonprofit hospitals (Labor-Management Relations Act of 1974, Pub. L. No. 93-360, 88 Stat. 395), concluding "that improvements in health care would result from the right to organize, and that unionism is necessary to overcome the poor working conditions retarding the delivery of quality health care" (*Beth Israel* v. *NLRB*, 437 U.S. 483, 499-500 (1978)). At the same time, Con-

gress addressed public concern "for the need to avoid disruption of patient care whenever possible" (S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974)) by amending Sections 8(b) and 8(e) of the Act to provide for advance notice of picketing and strikes, early notice of contract modification or termination, notice that an initial contract is to be negotiated, and mandatory mediation.

Similarly, Congress sought to reduce the likelihood of work stoppages by urging the National Labor Relations Board to limit the number of bargaining units it certified in nonprofit hospitals. House and Senate reports accompanying the final bill included the following statement (S. Rep. No. 93-766, *supra*, at 5; H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974):

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 N.L.R.B. No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 N.L.R.B. No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 N.L.R.B. No. 170, 83 LRRM 1242 (1973).[1]

[1] By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

2. On September 26, 1977, the International Union of Operating Engineers, Local 30-30A, AFL-CIO (the

"Union") filed a petition for a representation election seeking certification as the exclusive bargaining agent for a unit of maintenance and engineering employees employed by Mercy Hospital Association (the "Hospital"). The Hospital opposed the petition on the ground that the requested unit was inappropriate for collective bargaining and that the only appropriate unit was one including all service and maintenance employees (A. 1, 12-13, 114-115).[1] A hearing was held before a Board hearing officer on October 20 and 27, 1977, at which the following evidence was adduced (A. 12, 110).

The Hospital is a nonprofit 390-bed health care facility located in Rockville Centre, New York. It is organized into 32 departments or subdivisions, most of which are managed on a day-to-day basis by their respective department heads (A. 4, 13, 31, 111-112, 118-120). The Hospital's Building, Plant and Ground Maintenance Department (the "maintenance department") is comprised of 23 maintenance and engineering employees serving in 17 different job classifications (A. 13-14, 106).[2]

The maintenance department operates under the supervision of a maintenance coordinator who determines the qualifications required for all positions

[1] "A." refers to the appendix in the court below; copies have been lodged with the Clerk of this Court.

[2] Included in these classifications are employees in the carpentry, paint, plumbing and electrical shops, employees in the boiler plant, and employees engaged in general maintenance and grounds work (A. 13-14, 32-57, 106, 281-286).

within the department and is responsible for the selection and hiring, discipline, firing, evaluation, promotion, scheduling, assignment, and direction of all maintenance and engineering employees (A. 14, 120-123, 134-135, 161, 232-233). With the exception of carpenters, electricians, and boiler room personnel who report to the maintenance coordinator through shop chiefs, all maintenance department employees are under the sole and direct supervision of the coordinator (A. 14, 232-233, 332).

To meet the Hospital's standards for entry, maintenance department employees must be highly skilled and experienced in the various crafts and trades they practice (A. 15).[3] They are charged with maintaining the Hospital's grounds, buildings and equipment in safe and efficient operating condition. Their duties include inspecting, testing, servicing and operating sophisticated and complex equipment; performing construction, alteration and renovation work; and carrying out electrical work in compliance with applicable codes (A. 15-16, 32-57, 107-108, 175-178, 181, 185-186, 190, 193-195, 197-199, 205-206, 213, 278, 289-292, 313, 316-317).

[3] For instance, the chief watch engineer and assistant chief watch engineer must have either a marine or stationary engineer's license. In addition, both had substantial prior experience in operating high-pressure boiler room equipment (A. 15, 49, 51, 60-61, 100-101, 204-205, 280, 287, 288-289, 319-320). In fact, every one of the maintenance department's employees had significant experience in the craft or trade for which he or she was hired or in a related field before joining the department (A. 15, 58-59, 62-77, 80-81, 84-95, 98-99, 102-103, 180-182, 193, 208-210, 214-218, 247-249).

Maintenance department employees frequently assist each other in the performance of their duties and there is substantial interchange of skills and functions among them (A. 17-18, 32-33, 35, 38, 40, 108, 186, 190, 192, 227-228, 240-243, 250, 261-262, 268-269, 279, 288-291, 311-312, 314-316, 320-322).[4] In contrast, maintenance department employees lack significant functional and operational integration with other hospital personnel, including the Hospital's service employees.[5] Although maintenance department employees work at locations throughout the hospital complex, they are not assisted by other employees in the performance of their duties and their work is carried out with a minimum of interruption of the work of other departments (A. 19, 107, 256-258, 322).

Maintenance and other employees do not share common supervision (A. 19, 322). Nor is there significant transfer between the maintenance department and other departments; all but one of the present

[4] In addition, maintenance department employees report to a common office located in the hospital basement and work out of shop areas located in close proximity along the basement corridor; have their own locker rooms, which are not utilized by other employees; wear identifying uniforms different from those of other employees; and have time cards grouped together (A. 17-18, 141, 144, 148-151, 162, 267).

[5] The Hospital's service employees include aides, orderlies, technicians, printers, and housekeeping, laundry, dietary, mail room and communications workers. They typically perform their duties in conjunction with technical, nursing and other employees (A. 126-130, 146-147).

maintenance department employees were hired directly into the department, and no maintenance department employee has ever been transferred out of the department (A. 15, 58-59, 166-167). Promotion within the maintenance department is encouraged, and training and skills acquired on the job generally lead to advancement (A. 15, 18, 27, 166, 180-182, 202, 204, 207, 214-215, 217-218, 228, 271-272, 287, 317). Consistent with their specialized skill and experience, maintenance department employees generally receive higher wages than the Hospital's service employees. The Hospital's pay scale for the maintenance department provides higher rates of pay at both the top and bottom levels, and a higher rate of progression within each level than does the scale applicable to service employees (A. 16, 22-25).

Based on the foregoing, the Regional Director found that a unit comprised of the Hospital's maintenance department employees would be appropriate for collective bargaining purposes, and directed that an election be conducted (App. D, *infra*, 29a-41a).[6] The

[6] The unit found appropriate by the Regional Director is as follows (App. D, *infra*, 38a-39a):

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardners [sic], groundsmen, carpenters, painter/plasters [sic]), plumbers, boiler men, watch engineers and chauffeurs employeed by the [Hospital] at its Rockville Centre, New York location, excluding all other employees, guards and supervisors as defined in the Act.

Hospital's request for review of that finding was denied by the Board (A. 3; App. C, *infra*, 18a).

After the Union won the ensuing representation election and was certified as the unit's bargaining representative (A. 1, 6; App. C, *infra*, 21a), the Hospital refused to bargain. The Board found the Hospital to have thereby violated Sections 8(a)(5) and 8(a)(1) of the Act, and issued a bargaining order (*id.* at 22a-26a).

3. The court of appeals denied enforcement of the order and remanded "for consideration of the propriety of the certified unit under a standard affording appropriate deference to the mandate of Congress [to avoid undue proliferation of bargaining units]" (App. A, *infra*, 2a). In the court's view, the Board had initially been solicitous of this nonproliferation admonition but in later cases had become less so, concluding that it could give "sufficient deference to the congressional admonition * * * by applying to proposed hospital bargaining units the same community of interest approach ordinarily utilized for unit determinations in an industrial context" (*id.* at 10a).[7] Noting that this conclusion was based in part on the belief that Congress had added

[7] The community of interest criteria traditionally used by the Board include mutuality of interest in wages and hours; commonality of supervision, skills and functions; frequency of contact with other employees; degree of interchange and functional integration with other employees; and area bargaining practices. See, *e.g.*, *American Cyanamid Co.*, 131 N.L.R.B. 909, 910 (1961).

the admonition primarily "to forestall the grouping of health care institution employees by virtually every professional interest or job classification as has occurred, for example, in the construction industry" (*id.* at 11a), the court stated (*id.* at 11a-12a):

> We disagree. Our reading of the legislative history leads us to conclude that in the 1974 amendment Congress was expressing concern not only that health care institutions be spared the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria could also impede effective delivery of health care services. * * * Thus, we hold along with our sister circuits that when the Board makes a unit determination for health care institution employees, traditional community of interest factors "must be put in balance against the public interest in preventing fragmentation in the health care field." *St. Vincent's Hospital* v. *N.L.R.B.*, [567 F.2d 588, 592 (3d Cir. 1977)]. The Board in its decision must specify "the manner in which its unit determination * * * implement[s] or reflect[s] that admonition * * *." *N.L.R.B.* v. *West Suburban Hospital*, [570 F.2d 213, 216 (7th Cir. 1978)].

The court concluded that "[s]uch a course was not followed in the" instant case (App. A, *infra*, 12a).

REASONS FOR GRANTING THE WRIT

The court of appeals' decision, together with similar decisions in other circuits,[8] has created considerable confusion regarding the standard the Board should apply in making bargaining unit determinations in the health care industry. The Board has long since settled the question in other industries, enabling it to discharge effectively and with minimum disruption to future labor relations its statutory duty to determine whether proposed bargaining units are appropriate. In contrast, the health care industry, currently the subject of intense organizational activity,[9] has been unsettled by the spate of decisions rejecting

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[8] See *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965 (3d Cir. 1979); *NLRB* v. *West Suburban Hospital*, 570 F.2d 213, 216 (7th Cir. 1978); *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588 (3d Cir. 1977). See also *NLRB* v. *St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979); *Long Island College Hospital* v. *NLRB*, 566 F.2d 833 (2d Cir. 1977); *Memorial Hospital of Roxborough* v. *NLRB*, 545 F.2d 351 (3d Cir. 1976).

[9] Between August 1974 and January 1979, the Board conducted 1160 representation elections in hospitals: in half, a union won the election and subsequently was certified. *N.L.R.B. Statistical Services* (1979). Several cases presently pending in courts of appeals involve unit determinations in health care institutions. *Kansas City College of Osteopathic Medicine* v. *NLRB*, No. 79-1806 (8th Cir.); *Fresno Community Hospital* v. *NLRB*, No. 79-7510 (9th Cir.); *Riverside Methodist Hospital* v. *NLRB*, No. 79-1608 (6th Cir.); *Trinity Memorial Hospital of Cudahy, Inc.* v. *NLRB*, No. 79-2071 (7th Cir.); *NLRB* v. *Missouri Methodist Hospital Assoc.*, No. 79-1837 (8th Cir.), and see *Yonkers General Hospital* v. *NLRB*, No. 79-4124 (2d Cir.), remanded to the Board Jan. 17, 1980 in light of the court's decision in the instant case.

Board bargaining unit determinations. As the instant case demonstrates, uncertainty as to the validity of such determinations results in employer refusals to bargain with certified units, leading to time- and resource-consuming review and enforcement proceedings that inevitably delay the exercise of employee representational rights and, in some cases, erode them altogether. It is therefore important that this Court resolve the question presented here.

1. Congress has conferred upon the Board the authority and responsibility, under Section 9(b) of the Act, 29 U.S.C. 159(b), to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." As this Court has noted, "[t]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947). The Board, therefore, necessarily exercises "a large measure of informed discretion" in determining the scope of an appropriate unit, "and the decision of the Board, if not final, is rarely to be disturbed." *Ibid.* Moreover, in order to effectuate the right of employees to self-organization, the Board, in making unit determinations, is not required to select the only appropriate or even the most appropriate unit, but merely "to choose an appropriate unit * * * [from] several appropriate ones." *Wheeler-Van Label Co.* v.

NLRB, 408 F.2d 613, 617 (2d Cir.), cert. denied, 396 U.S. 834 (1969). See also *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 152 (1941). Thus, a group of employees with similar interests is not precluded from seeking representation merely because other categories of employees who might also appropriately be included in the same unit do not share that desire.

2. When Congress amended the Act in 1974 to extend its coverage to nonprofit hospitals, it modified various provisions of the Act to meet the particular needs of such institutions. See page 4, *supra*. However, Congress did not consider it necessary to modify or qualify the terms of Section 9(b). Indeed, the Senate rejected a proposal by Senator Taft that would have amended Section 9 to limit to four the number of bargaining units that could be found appropriate in health care institutions absent employer consent: (1) all professional employees; (2) all technicians; (3) all clerical employees; (4) all service and maintenance employees. S. 2292, 93d Cong., 1st Sess. (1973).

Congress's rejection of this proposal in favor of the insertion in the legislative history of a general admonition to avoid undue bargaining unit proliferation manifests an intent to leave to the Board's sound discretion (to be exercised in light of that admonition) the determination of what units are appropriate in the health care industry. As this Court observed in *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 497 (1978), in rejecting the argument that given Con-

gress's concern that extension of the Act to hospital workers not result in disruption to patient care, the Board is precluded from applying its traditional principles regarding solicitation and distribution:

> It is significant that * * * Congress did not enact any special provision regarding solicitation and distribution in particular or disruption of patient care in general other than through strikes. We can only infer, therefore, that Congress was satisfied to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers.

Here, Congress was "satisfied to rely on the Board" to strike the appropriate balance between the need to minimize the likelihood of disruption to patient care and the Board's statutory obligation under Section 9(b) to "assure to employees the fullest freedom in exercising" the right to organize and be represented.

Like the form, the language chosen by Congress to admonish against bargaining unit proliferation was calculated to preserve the Board's traditional flexibility in making unit determinations.[10]

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[10] The cases referred to in the admonition do not indicate an intent on the part of Congress to limit the Board's discretion or preclude the type of unit found appropriate here. In *Four Seasons Nursing Center*, 208 N.L.R.B. 403 (1974), the Board dismissed a petition for a unit of two unskilled maintenance employees. In *Woodland Park Hospital, Inc.*, 205 N.L.R.B. 888, 889 (1973), where the hospital employed some 45 technicians in eight different departments, the Board determined that a departmental unit of 12 x-ray technicians was inappropriate, since the employees did not have a community of interest that was separately identifiable from some of the other technical employees. In *Extendicare of West Virginia, Inc.*, 203 N.L.R.B. 1232, 1233 (1973), the union sought representation of three separate units—licensed practical nurses, technical employees, and service and maintenance employees. The hospital contended that the only appropriate unit was one consisting of all employees. The Board grouped together technical employees and service and maintenance employees because they shared a substantial community of interest. The question of a separate skilled maintenance unit was not presented for the Board's consideration. See *Long Island College Hospital* v. *NLRB*, 566 F.2d 833, 844 n.4 (2d Cir. 1977).

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 N.L.R.B. No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 N.L.R.B. No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 N.L.R.B. No. 170, 83 LRRM 1242 (1973).[1] [120 Cong. Rec. 12944 (1974)]

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[1] By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

As Senator Williams, sponsor of the bill (S. 3203) ultimately enacted, explained (120 Cong. Rec. 22575 (1974)):

> The National Labor Relations Board has shown good judgment in establishing appropriate units for the purpose of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a

rule, tended to avoid unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area of a notable disparity of interests between employees in different job classifications.

While the committee clearly intends that the Board give due consideration to its admonition to avoid undue proliferation of units in the health care industry, it did not, within this framework, intend to preclude the Board, acting in the public interest, from exercising its specialized experience and expert knowledge in determining appropriate bargaining units.

Even Senator Taft, who eventually co-sponsored S. 3203, while emphasizing that the Board should exercise "great caution" to avoid "[u]nwarranted unit fragmentation" pronounced the non-proliferation admonition "a sound approach and a constructive compromise as the Board should be permitted some flexibility in unit determination cases." 120 Cong. Rec. 12944 (1974).

3. In admonishing the Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry," Congress responded to the fact that hospitals employ specialists in scores of categories, each of which conceivably could claim entitlement to a separate bargaining unit based on distinctions of skill. Thus, Senator Taft spoke of the danger of permitting "*each professional interest and job classification* * * * to form a separate

bargaining unit * * *." 120 Cong. Rec. 12944 (1974) (emphasis added).[11] He also warned that unwarranted unit fragmentation would be productive of "jurisdictional disputes and work stoppages," adding that "[h]ealth-care institutions must not be permitted to go the route of other industries, particularly the construction trades." *Id.* at 12944-12945. Similarly, during hearings on the bills which formed the basis for the 1974 amendments, various health care industry representatives expressed the desire to avoid a highly fragmented craft pattern of bargaining.[12]

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[11] Similarly, Senator Dominick remarked that "[t]here are approximately two hundred potential bargaining units as now defined by the Act within the walls of almost every hospital." 120 Cong. Rec. 19269 (1974).

[12] For example, Jerry Ransohoff, Executive Secretary of the Greater Cincinnati Hospital Council, observed:

> Because it is labor-intensive, the health industry and its patients are critically dependent upon the effective team function of the people involved. While a work stoppage or slowdown may be acceptable in the building industry or the newspaper industry, it can mean pain, continued illness or even death in a hospital. Like construction and newspapers, also relatively labor-intensive, hospitals are divided into many highly specialized crafts, each of which has a vital role in the team effort. The legislation which you are now considering has contributed to fractionation and multiple craft negotiation in construction and newspapers. Six stereotypers can tie up a major newspaper. It is conceivable that 10 laboratory technologists can close a major hospital. Newspaper negotiators deal with seven or eight craft unions. The present legislation, as written could envision a hospital administrator dealing with 15 or more.

Coverage of Nonprofit Hospitals under National Labor Relations Act, 1972: Hearings on H.R. 11357 Before the Subcomm.

As the court of appeals noted (App. A, *infra*, 10a), the Board examined this legislative history at length in *Allegheny General Hospital*, 239 N.L.R.B. No. 104 (1978) (App. E, *infra*, 42a-71a), enforcement denied, 608 F.2d 965 (3d Cir. 1979), and concluded that the congressional admonition was not intended to caution against application of the standards applied to the industrial sector generally, but rather as a caution to avoid the extreme fragmentation along craft or skill lines described above (App. E, *infra*, 49a-56a). Accordingly, the Board reasoned that "Congress in-

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on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 238-239 (1972).

William Emmanuel, testifying on behalf of the California Hospital Association, explained that hospitals are "unusually vulnerable" to the problem of unit proliferation "because of the diversity and makeup of the work force," and expressed the fear that "the Board would approve 10 or 15 or possibly even more bargaining units in one hospital, all with different contract expiration dates" which "would lead to a situation where a hospital would have absolutely no labor stability." *Id.* at 158. Sidney Lewine, testifying on behalf of the American Hospital Association, raised the spectre of separate bargaining units for each professional and craft grouping, noting that "[t]here are over 125 separate occupational classifications in the health care field with an overwhelming percentage of the employees in these classifications being critical to the efficient operation of hospitals." Lewine concluded that "[t]he health care institutions of this country would face major difficulties in attempting to provide coordinated services if forced to bargain separately with many different employee groups within their institution." *Coverage of Nonprofit Hospitals under National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 175 (1973).

tended that the appropriateness of health care units should be determined by the Board's traditional community-of-interest criteria" (*id.* at 56a), subject to the caveat that groupings based on crafts, professional skills, or job functions should be held to a minimum.

Applying this standard, since 1974 the Board has found appropriate in the health care industry at most four nonprofessional units: technicians, office clerical employees, service employees, and maintenance employees. *Id.* at 68a.[13] Professional employees have been grouped into three units: physicians, registered nurses, all other professionals. *Ibid.* It is the Board's informed judgment that "[t]hese [seven] basic units are sufficiently inclusive to cover any health care institution's complement of employees." *Ibid.*

4. The Board's reading of the pertinent legislative history is reasonable and, accordingly, entitled to deference. *Beth Israel Hospital* v. *NLRB*, *supra*, 437 U.S. at 499-500. See also *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979); *American Broadcasting Co.* v. *Writers Guild of America*, 437 U.S. 411, 431 (1978); *NLRB* v. *Local 103 Iron Workers*, 434 U.S. 335, 350 (1978). Moreover, whatever the degree of bargaining unit fragmentation Congress sought to avoid, the bargaining unit pattern that has emerged in the health care industry meets the test.

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[13] The Board has on occasion found powerhouse employees entitled to separate representation but only where the maintenance and service workers were combined in a single unit. Where a separate maintenance unit was found appropriate, powerhouse employees were included in it, thus preserving the four-unit maximum for nonprofessionals. *Id.* at 68a-69a.

It is plain that without abandoning its principal reliance on traditional community of interest criteria, the Board has in fact paid heed to Congress's admonition. Thus, the court of appeals' quarrel with the Board exalts form over substance. The decision below seeks to do what Congress chose not to do—to dictate to the Board the manner in which the congressional admonition is to be respected.

Worse, the practical effect of the decision is to require the Board to select the broadest possible bargaining unit absent special circumstances, even though a less inclusive unit would not produce the result Congress feared. As a consequence, employees desiring representation who would otherwise constitute an appropriate unit must forego representation if they share interests with a broader group of employees, until and unless the larger group shares that desire. Such a result would deny the very rights to collective representation that Congress sought to confer in extending the Act to employees in health care institutions. In effect, the court of appeals has reversed the exception and the rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAWRENCE BLATNIK
Attorney
National Labor Relations Board

FEBRUARY 1980

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1168—August Term, 1978

(Argued June 15, 1979 Decided September 4, 1979)

Docket No. 79-4044

NATIONAL LABOR RELATIONS BOARD, PETITIONER

—*v.*—

MERCY HOSPITAL ASSOCIATION, RESPONDENT.

Before: MANSFIELD, MULLIGAN and TIMBERS, *Circuit Judges.*

MULLIGAN, *Circuit Judge*:

The National Labor Relations Board applies for enforcement of its order requiring the Mercy Hospital Association (the Hospital) to bargain with a Board-certified union consisting of the maintenance employees of the Hospital. In its decision certifying the bargaining unit the Board did not discuss the weight—if any—which it gave to the congressional admonition against the proliferation of bargaining

units in the health care field. We therefore remand to the Board for consideration of the propriety of the certified unit under a standard affording appropriate deference to the mandate of Congress.

The Hospital, a non-profit 390 bed facility, retains 1,287 full and part-time employees. There is no history of collective bargaining for any Hospital employees. The Hospital is organized into 32 departments or subdivisions of which the maintenance department is one. At the time the petition for election was filed there were 23 maintenance department employees with 17 different job titles.[1]

In September, 1977 the International Union of Operating Engineers, Local 30-30A, AFL-CIO (the

[1] The 17 job classifications are allocated among various skills or shops as follows:

carpentry shop:	chief carpenter (1) senior carpenter (2) maintenance carpenter (this position was open at the time of the hearing)
paint shop:	painter/plasterer (1)
plumbing shop:	maintenance plumber (1) maintenance mechanic (1)
electrical shop:	chief electrician (1) maintenance electrician (2)
boiler plant:	chief watch engineer (1) assistant chief watch engineer (1) senior watch engineer (2) maintenance boiler room attendant (1)
general maintenance:	senior maintenance worker (3) maintenance worker (3)
grounds:	senior gardner (1) groundsman (1) chauffeur (1)

Union), filed with the Board a petition for certification as the exclusive bargaining representative of the Hospital's maintenance employees. The Hospital contested the propriety of such a bargaining unit, claiming, *inter alia*, that limiting the unit to maintenance employees would in this instance contravene the directive of Congress that the Board give due consideration to preventing proliferation of bargaining units in non-profit health care facilities. After hearings on the issue the Board's regional director found that a separate unit of maintenance employees was appropriate for collective bargaining. In December, 1977 the Board denied the Hospital's request for review of the regional director's decision and direction of election. Thereafter, an election was held in which a majority of the employees in the unit selected the Union as their collective bargaining representation. When the Hospital refused to negotiate the Union filed an unfair labor practice charge with the Board, alleging a violation of sections 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. § 158(a)(1), (5).

The Board's General Counsel moved for summary judgment on the ground that the issues raised by the Hospital had been litigated in the underlying representation proceeding. The Board granted the motion, finding that the Hospital was seeking to relitigate issues decided against it in the presentation proceeding, and that the Union had been properly certified as bargaining representative of the Hospital's maintenance employees. Therefore, the Board concluded that the Hospital's refusal to bargain was in vio-

lation of the Act and required the Hospital to bargain with the Union upon request.

Under the Act the Board has the responsibility to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Section 9(b), 29 U.S.C. § 159(b). Hence, unit determinations are matters committed by statute to the Board's discretion and are rarely disturbed by the courts. *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947). "Nevertheless, it remains for the courts to insure that the exercise of the agency's discretion is not unreasonable, arbitrary, or in conflict with congressional intent." *St. Vincent's Hospital* v. *N.L.R.B.*, 567 F.2d 588, 590 (3d Cir. 1977); accord, *Long Island College Hospital* v. *N.L.R.B.*, 566 F.2d 833, 840 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978).

In this case an assessment of the propriety of the Board's unit determination must take place in the context of the 1974 amendment extending coverage of the Act to non-profit hospitals which had been previously exempted by the Taft-Hartley Act. 61 Stat. 137 (1947); 29 U.S.C. § 152(2). The amendment was prompted by the conclusion of Congress that there was "no acceptable reason why 1,427,012 employees of . . . non-profit, non-public hospitals . . . should continue to be excluded from the coverage and protections of the Act." S. Rep. No. 93-766, 93d

Cong., 2d Sess. (1974), *reprinted in* 2 [1974] U.S. Code Cong. & Ad. News 3946, at 3948. At the same time, however, Congress was concerned that work stoppages arising out of inter-union jurisdictional disputes and the reluctance of many union members to cross the picket lines of other unions posed serious threats to uninterrupted patient care. See id. at 3948-52. Sensitivity to such dangers resulted in the incorporation into the amendment of a number of mandatory procedures, including strike notice requirements for unions representing employees of health care institutions. Id. at 3951.

In addition, Senator Taft offered a provision which would have prevented Board approval of more than the following four bargaining units in any health care institution: (1) professional employees, (2) technical employees, (3) clerical employees, (4) maintenance and service employees. S. 2292, 93d Cong., 1st Sess. (1973). While this specific limitation on the Board's discretion was not adopted, congressional concern for the underlying problem was embodied in a directive inserted in both the House and Senate Reports accompanying the final version of the bill:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84

> LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]
>
> 1) By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

S. Rep. No. 93-766, 93d Cong., 2d Sess. (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 3946, at 3950; H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974).

Senators Taft and Williams, co-sponsors of the 1974 amendment to the Act, explained this directive during floor discussion on the bill. Senator Taft stated:

> . . . this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.
>
> The administrative problems from a practical operational viewpoint and labor relation [sic] viewpoint must be considered by the Board on this issue. Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard.

120 Cong. Rec. 12944-45 (1974).

He further observed that

> every effort should be made to prevent a proliferation of bargaining units in the health care field and this was one of the central issues leading to agreement on this legislation. In this area there is a definite need for the Board to examine the public interest in determining appropriate bargaining units.

S. Rep. No. 93-766, 93d Cong., 2d Sess. at 255 (1974); accord 120 Cong. Rec. 22949 (1974) (remarks of Congressman Ashbrook).

The legislative history of the 1974 amendment clearly reveals that Congress expected the Board, when determining in its discretion an appropriate bargaining unit in a health care institution, to give substantial weight to the public interest in preventing unit fragmentation. Indeed, in *Shriner's Hospital*, 217 N.L.R.B. 806 (1975), decided soon after enactment of the 1974 amendment, the Board seemed to perceive the congressional mandate in precisely that way.

> In adopting the hospital amendments, Congress recognized that labor relations in the health care industry require special consideration due to the uniqueness of that industry in terms of the services it provides to the sick, infirm, or aged.
>
> It is in the context of the peculiar nature of the industry and the congressional mandate against the proliferation of bargaining units that we have weighed all of the criteria traditionally considered when making a unit determination and have, on balance, concluded that it is proper to place special significance on the high degree

of integration of operations performed throughout a health care facility.

Were we to adopt the rationale applied by our dissenting colleagues, we could be faced with requests to find appropriate dozens of separate units of employees performing diverse professional, technical, and service and maintenance functions in an industry which, by its very nature, requires great numbers of employees in a myriad of classifications all ultimately involved in providing patient ca . We shall not do so, because such an approach can only lead to an undue fragmentation of bargaining units in the health care industry which would totally frustrate congressional intent.

Id. at 808.

In later decisions, however, the Board has been less solicitous of the directive of Congress.[2] As a con-

[2] In *Long Island College Hospital* v. *N.L.R.B., supra,* 566 F.2d at 843, we observed that the Board's decisions in this area had fallen into disarray. Of the rulings there collected, the Board had rejected bargaining units limited to maintenance employees 11 times and approved them only four times including the later reversed decision in *West Suburban Hospital,* 224 N.L.R.B. 1349 (1976), enforcement denied, 570 F.2d 213 (7th Cir. 1978). Subsequently the Board has approved separate maintenance units with increasing frequency. *St. Vincent's Hospital and Medical Center of Toledo,* 241 N.L.R.B. No. 90 (1979); *Alleghany General Hospital,* 239 N.L.R.B. No. 104 (1978), application for enforcement pending (3d Cir. Nos. 77-2090, 79-1085); see *Southern Maryland Hospital Center,* 241 N.L.R.B. No. 91 (1979) (engineering and maintenance employees); *Fresno Community Hospital,* 241 N.L.R.B. No. 73 (1979) (engineering, electrical and maintenance employees); *Long Island College Hospital,* 239 N.L.R.B. No. 163 (1978) (engineering and maintenance employees).

sequence two circuit courts of appeals have denied enforcement of bargaining orders requiring hospitals to bargain with Board-certified units. In *St. Vincent's Hospital* v. *N.L.R.B., supra,* the Board had certified a bargaining unit consisting of boiler operators and three other maintenance workers in a hospital employing some 280 employees. The Third Circuit found that in approving the unit the Board had relied only on traditional industrial standards under which the employees in the unit could have been found to possess a sufficient separate community of interest to justify certification.[3] The Court refused to approve the Board's bargaining order and stated that

> . . . the factors of amount of contact between workers, separate immediate supervision, and the special skills of certain crafts must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with congressional intent to treat this unique field in a special manner.

Id. at 592.

[3] Under the traditional community of interest test the Board examines a number of factors including

> the level of skill required to perform the bulk of the maintenance work involved; the amount of production employees' work, if any the maintenance employees perform, and vice versa; the degree of interchange between production and maintenance departments; the degree of shared supervision; the location of the maintenance department.

Alleghany General Hospital, supra, 239 N.L.R.B. No. 104, at 19 n.65.

Even more pertinent to the case *sub judice* is the Seventh Circuit's refusal to approve the Board's certification of a bargaining unit consisting solely of a hospital's maintenance personnel in *N.L.R.B.* v. *West Suburban Hospital*, 570 F.2d 213 (1978). The court was distressed by the apparently exclusive reliance of the Board in making the unit determination on traditional criteria such as the amount of contact among maintenance employees and the time spent by those employees in the physical confines of the maintenance department. The court faulted the Board's "mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication from the Board as to the manner in which its unit determination . . . implemented or reflected that admonition." Id. at 216.

In response to such judicial criticism, see also *Memorial Hospital of Roxborough* v. *N.L.R.B.*, 545 F.2d 351, 360-61 (3d Cir. 1976), the Board in *Alleghany General Hospital*, 239 N.L.R.B. No. 104 (1978), application for enforcement pending (3d Cir. Nos. 77-2090, 79-1085), re-examined at length the legislative history of the 1974 amendment. Over a vigorous dissent by member Penello, the Board concluded that it gave sufficient deference to the congressional admonition against undue proliferation of bargaining units in health care institutions by applying to proposed hospital bargaining units the same community of interest approach ordinarily utilized for unit determinations in an industrial context. The Board reasoned that the congressional directive was

really meant to forestall the grouping of health care institution employees by virtually *every* professional interest or job classification as has occurred, for example, in the construction industry. Id. at 9-11. Since application of a community of interest test, however, has not generally resulted in such fragmentation of bargaining units in the industrial setting, the Board concluded that the sole use of that standard for determining hospital bargaining units satisfied the mandate of the 1974 amendment. Id. at 19.

We disagree. Our reading of the legislative history leads us to conclude that in the 1974 amendment Congress was expressing concern not only that health care institutions be spared the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria could also impede effective delivery of health care services. See *N.L.R.B.* v. *West Suburban Hospital*, *supra*, 570 F.2d at 215; *St. Vincent's Hospital* v. *N.L.R.B.*, *supra*, 567 F.2d at 592; *Alleghany Hospital*, *supra*, 239 N.L.R.B. No. 104 at 34 (member Penello, dissenting). See also *Memorial Hospital of Roxborough* v. *N.L.R.B.*, *supra*, 545 F.2d at 361. Thus, we hold along with our sister circuits that when the Board makes a unit determination for health care institution employees, traditional community of interest factors "must be put in balance against the public interest in preventing fragmentation in the health care field." *St. Vincent's* v. *N.L.R.B.*, *supra*, 567 F.2d at 592. The Board in its

decision must specify "the manner in which its unit determination . . . implement[s] or reflect[s] that admonition . . . ." *N.L.R.B.* v. *West Suburban Hospital, supra,* 570 F.2d at 216.[4]

Such a course was not followed in the case before us. The Board's conclusion that maintenance department employees should be represented by a separate bargaining unit was premised solely on analysis of traditional criteria; (1) lack of operational and functional integration with other employees, (2) prevalent functional integration within the maintenance department itself, (3) skill and experience of the mainnance employees, (4) supervision by a separate supervisory hierarchy, and (5) generally higher wage rates of maintenance employees in comparison to service employees. The regional director, whose opinion was adopted without further elaboration by the Board, ruled that the presence of the above factors demonstrated a "community of interest sufficiently separate and distinct from the service and other Hospital employees to justify a separate maintenance unit." The decision's single reference to the congressional admonition against proliferation of bargaining

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[4] In a recent opinion, *N.L.R.B.* v. *St. Francis Hospital,* 101 L.R.R.M. 2943 (1979), the United States Court of Appeals for the Ninth Circuit refused enforcement of a Board order which had certified a separate unit for registered nurses in a nonprofit hospital rather than an all professional unit. The court was critical of the "per se" approach of the Board and remanded for an independent weighing of the factors involved in that case in light of the congressional concerns we have here set forth.

units was the conclusory observation that the congressional directive did "not preclude the appropriateness of a maintenance unit." This does not comply with the congressional concern which we have set forth in some detail and which requires an independent evaluation of the factors in this particular hospital. We therefore deny enforcement of the Board's order and remand for reconsideration consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of September, one thousand nine hundred and seventy-nine.

Present: HON. WALTER R. MANSFIELD
HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
Circuit Judges

[Filed Sep. 4, 1979]

79-4044

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

MERCY HOSPITAL ASSOCIATION, RESPONDENT.

An application for enforcement of an order of the National Labor Relations Board.

This cause came to be heard on a certified list of items comprising the record of the National Labor Relations Board and was argued by counsel.

Upon consideration thereof, it is hereby ordered, adjudged and decreed that the application for en-

forcement be and it hereby is denied and the action be and it hereby is remanded to said Board for further proceedings in accordance with the opinion of this court with costs to be taxed against the petitioner.

A. DANIEL FUSARO
Clerk
/s/ Arthur Heller
BY: ARTHUR HELLER
Deputy Clerk

A true copy,

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 29-CA-6279

MERCY HOSPITAL ASSOCIATION

and

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 30-30A, AFL-CIO

DECISION AND ORDER

Upon a charge filed on March 17, 1978, and an amended charged filed on March 20, 1978, by International Union of Operating Engineers, Local 30-30A, AFL-CIO, herein called the Union, and duly served on Mercy Hospital Association, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint on April 11, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 20, 1977,

following a Board election in Case 29-RC-3988, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate and that, commencing on or about February 24, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 19, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 9, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 25, 1978, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Na-

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[1] Official notice is taken of the record in the representation proceeding, Case 29-RC-3988, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

tional Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceedinge, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its opposition to the General Counsel's Motion for Summary Judgment and answer to the complaint, Respondent admits that it has refused to bargain with the Union, but asserts that the Union does not represent the Respondent's employees in a unit appropriate for purposes of collective bargaining. It requests that the Board review its previous holdings that separate hospital maintenance units are appropriate. Counsel for the General Counsel argues that there are no matters warranting a hearing, because the issues concerning the Union's certification were raised and determined in the representation case. We agree with the General Counsel.

Our review of the record herein, including the record in Case 29—RC—3988, indicates that the Regional Director's Decision and Direction of Election was issued on November 11, 1977, Respondent requested review of the Decision and Direction, contending the separate hospital maintenance unit approved by the Regional Director was inappropriate. The Board denied the request for review on December 7, 1977, and the election was held on December 8, 1977. The tally of ballots showed 18 votes cast for the Union and 3 against. No objections were filed.

It is well sentled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Respondent Mercy Hospital Association is a New York nonprofit corporation with its principal place of business in Rockville Centre, New York, where it is engaged in the operation of a nonprofit hospital. During the past 12 months, a representative period,

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[2] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67 (f) and 102.69(c).

Respondent received in excess of $250,000 in gross revenues for providing health care and related services, and purchased and caused to be transported and caused to be transported and delivered to its place of business in interstate commerce directly from States of the United States other than the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Union of Operating Engineers, Local 30-30A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasterers, plumbers, boilermen, watch

> engineers, and chauffeurs employed by the Employer at its Rockville Centre, New York, location, excluding all other employees, guards and all supervisors as defined in the Act.

2. The certification

On December 8, 1977, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 29, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 20, 1977, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about February 2, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 24, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 24, 1978, and at all times thereafter, refused to bargain collectively with the Union as the

exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a colse, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as

the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Mercy Hospital Association is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 30-30A, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time maintenance and engineering employees including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasters, plumbers, boilermen, watch engineers, and chauffeurs employed by the Employer at its Rockville Centre, New York, location, excluding all other employees, guards and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 20, 1977, the above-named labor organization has been and now is the certified and

exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 24, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mercy Hospital Association, Rockville Centre, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 30-30A, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasterers, plumbers, boilermen, watch engineers and chauffeurs employed by the Employer at its Rockville Centre, New York location, excluding all other employees, guards, and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Rockville Centre, New York, facility copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. September 29, 1978.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

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[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 30-30A, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasterers, plumbers, boilermen, watch engineers and chauffeurs employed by the Employer at its Rockville Centre, New York, loca-

tion, excluding all other employees, guards and all supervisors as defined in the Act.

MERCY HOSPITAL ASSOCIATION
(Employer)

Dated———— By————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212-596-7709.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION 29

Case No. 29-RC-3988

MERCY HOSPITAL ASSOCIATION, EMPLOYER

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30-30A, AFL-CIO, PETITIONER [1]

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Owen Epstein, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The names of the parties appear as amended at the hearing.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit of all full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painting/plasterers, plumbers, boiler men, watch engineers and chauffeurs employed by the Employer at its premises located at 100 North Village Avenue, Rockville Centre, New York, excluding all other employees, guards and supervisors as defined in the Act.[2] The Petitioner contends that the petitioned-for employees constitute a distinct group based upon similarity of experience, skill, wages and working conditions, thus justifying separate representation. The Employer, on the other hand contends that the unit sought is inappropriate and that the only appropriate unit is one consisting of a hospitalwide service and maintenance unit.

The hospital complex consists of three building components: the Molloy Pavilion; the Kellenberg Pavilion; and the Women's Pavilion. All are connected by corridors or a tunnel. The hospital is a 390 bed institution which employs 1,287 employees. There is no history of collective bargaining for any of the Employer's employees revealed in the record.

[2] The unit appears as amended at the hearing.

The hospital, a non-profit facility, is divided into 32 departments which are administered by an administrator, four assistant administrators and separate department heads for each of the various departments, except for very small departments which report directly to an assistant administrator. The maintenance and engineering department, which has the title of the Building, Plant and Ground Maintenance department is further divided into six shops: (1) the carpentry shop; (2) the paint shop; (3) the plumbing shop; (4) the electrical shop; (5) the boiler room shop; and (6) the grounds crew and chauffeur. The carpentry, electrical and boiler room shops are each headed by a leadman.[3]

The Employer has the following employees and classifications within the maintenance department: (1) carpentry shop—one chief carpenter, one senior carpenter and one maintenance carpenter;[4] (2) paint shop—one painter/plasterer; (3) plumbing shop—one maintenance mechanic and one maintenance plumber; (4) electrical shop—one chief electrician and two maintenance electricians; (5) boiler room—one chief watch engineer, one assistant chief watch engineer, two senior watch engineers and one boiler attendant; (6) grounds crew—one gardener, one groundsman and one chauffeur. Thus, the requested unit includes 23 employees in 17 job classifications.

[3] The Petitioner and the Employer agree that the foreman carpenter, the chief electrician and the chief watch engineer are not supervisors within the meaning of the Act.

[4] At the time of the hearing the maintenance carpenter classification was vacant.

The maintenance department is under the overall supervision of Henry Smith, the department head who possesses the title of Maintenance Coordinator. Everyone in the maintenance department is under his direct supervision except the senior carpenter, who reports to the chief carpenter, the two maintenance electricians, who report to the chief electrician and the assistant chief watch engineer, and the boiler attendant, who report to the chief watch engineer. The foreman carpenter, the chief electrician and the chief watch engineer all report to the department head. The Personnel Department forwards employment applications to the department head for consideration and reviews the department head's decisions with respect to hiring and firing employees to insure compliance with hospital procedures. However, with regard to hiring, firing, disciplinary action, promotions, vacation scheduling and time off as it relates to employees within the maintenance department, the department head, Smith, possesses the operative authority. Furthermore, the record reveals that it is the department head who sets the qualification requirements for all positions within the department. Additionally, the department head consults with the various shop chiefs with respect to new hires.

The record reveals that the employees in the maintenance department are highly skilled employees. According to the Employer's job descriptions, the chief watch engineer and the assistant chief watch engineer must hold licenses. Although not required, the chief electrician also holds a license. The record further shows that all of the Employer's maintenance employees were considered for employment and hired on the basis of their past experience in the jobs sought. For example, the painter/plasterer is a journeyman plasterer and the senior carpenter was employed as a carpenter prior to his employment with the Employer.

Consistent with the Employer's high standards for entry into the maintenance department, there has been insignificant transfer between employees in the unit sought and those outside the unit. Although the Employer has implemented a job-posting system, the record discloses only two transfers into the maintenance department and no transfers out of the maintenance department.[5]

The maintenance department is charged with the responsibility of maintaining the physical integrity of the hospital grounds and buildings. Although certain specialized maintenance work is contracted to outside contractors, for example, repair and maintenance work on sprinkler systems, patient monitoring equipment, such as EKG and X-ray machines; elevators and escalators; the maintenance employees themselves also perform major repair work, such as replacing main steam valves on the high-pressure steam boilers, and service complex and sophisticated equipment, such as the air-conditioning system, incu-

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[5] One housekeeping employee transferred into the chauffeur's position and another housekeeping employee, who had considerable carpentry, electrical and plumbing experience, also transferred into the department.

bators and "bird" machines. Smith testified that the maintenance employees possess the required skills to perform much of the work that is contracted out but lack the necessary tools to do these jobs.

The maintenance department employees perform such highly skilled work as building and hanging doors, making and installing cabinets and shelving, bathroom layouts, welding and soldering jobs, electrical work done in compliance with various electrical codes, chemical analysis tests on boiler water and are also responsible for the operation and maintenance of the high-pressure steam boilers and related equipment. Furthermore, Smith testified that he calls upon the senior-carpenter to give job and material estimates and to solicit prices from vendors.

The wage rates received by the maintenance personnel reflect their specialized skill and experience. The record reveals that they are generally in higher wage levels than most service employees and the maintenance department also has a generally higher rate of progression within each level, and a higher rate of pay at both the bottom and the top levels than the service department. The Employer has maintained separate pay scales for the service department and maintenance department since 1971 or 1972 when, as the result of a wage evaluation, the Employer increased the wages of the maintenance employees but did not accord increases to the service department employees.

With the exception of the boiler room personnel, the maintenance employees work throughout the hos-

pital. They respond to work requests made by other departments, by contacting the Maintenance Coordinator who then makes the assignment, either himself or through a shop chief, and also perform regularly scheduled preventive maintenance work on various pieces of equipment in all areas of the hospital. Smith testified that maintenance employees work in conjunction with other hospital employees unloading trucks; during disaster and fire drills; and in certain flooding situations; for example, when stopped up toilets overflow requiring clean up measures. The record also reveals that the chauffeur makes deliveries for various other departments and the groundsman, and on occasion some other maintenance employees, work together with the housekeeping and dietary employees in setting up tables, chairs and related equipment for the annual Christmas party, picnic and fair. The record reveals that other than the above occasions, the maintenance employees do not work jointly with service or other hospital employees. The maintenance employees spend the vast majority of their time performing their specialities in tasks which are usually one person jobs.

Integration of operation and function is prevalent within the maintenance department. In performing normal maintenance duties, the maintenance department employees are in frequent contact with one another; for example, the senior maintenance and maintenance workers relieve the boiler personnel during lunch breaks and are from time to time called upon to assist the assistant chief watch engineer;

the electricians and plumbers perform repair and maintenance work in the boiler room; the senior maintenance workers assist the electricians, plumbers and painter/plasterer in all areas of the hospital; and all maintenance employees work together on rennovation jobs. Furthermore, the maintenance department time cards are grouped by department. The maintenance employees are all headquartered on the basement floor of the hospital but in separate shops. In addition to contact resulting from work performed together and from close proximity of the various maintenance shops, the maintenance department employees have separate lockers, a department Christmas party in addition to the hospital-wide Christmas party and a separate "Sunshine" fund kept for the purpose of sending cards or gifts to all or retiring maintenance employees. Thus, these occasions provide further opportunity for intra-departmental contact.

The primary functions of the groundsman and the gardener consist of keeping the grounds clean of debris, cutting grass, planting flowers and removing snow. However, when not so engaged, especially during inclement weather, they assist in maintaining equipment and also assist the senior maintenance workers in their duties. Furthermore, the chauffeur is required to maintain and make minor repairs on his vehicle, and the gardener and the groundsman are required to maintain and repair a tractor and truck, respectively.

Promotional opportunities within the maintenance department are encouraged by the Employer. For example, the senior watch engineers and the maintenance workers can, through on-the-job training, become the assistant chief watch engineer and senior maintenance workers, respectively, and this has occurred. In fact, the present assistant chief watch engineer was hired initially by the Employer as a maintenance mechanic.

All of the Employer's employees, including the petitioned-for maintenance employees, share a number of basic working conditions and benefits, including, *inter alia*, paid holidays, a 37 and one half hour work week, an hourly pay rate, insurance coverage, access to the employee cafeteria, free parking, vacations, grievance procedure and orientation program. The maintenance department employees share two time clocks with other hospital employees and the Employer also has a centralized personnel policy which is administered by the personnel department and applies to all employees.

In determining the appropriateness of a separate maintenance and engineering department unit in health care institutions, the Board applies its traditional unit criteria, i.e., mutuality of interest in wages, benefits, and working conditions; commonality of skills and supervision; frequency of contact with other employees; interchange and functional integration; and area practice. The Congressional admonition against proliferation of bargaining units in the health care industry does not preclude the appropri-

ateness of a maintenance unit.[6] In view of the maintenance employees' lack of operational and functional integration with other employees,[7] the prevalent functional integration within the maintenance department itself;[8] their skill and experience in their respective jobs;[9] their supervision by a separate supervisory hierarchy;[10] and their generally higher wage rates than those of service employees, I am persuaded, based on the foregoing and the record as a whole, that the employees in the petitioned-for maintenance and engineering unit possess a community of interest sufficiently separate and distinct from the service employees; and the other departments of the Employer to justify placing them in a separate unit.[11]

5. Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance and engineering employees, including maintenance

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[6] *The Jewish Hospital Association of Cincinnati,* d/b/a *Jewish Hospital of Cincinnati,* 223 NLRB 614.

[7] *St. Francis Hospital Medical Center,* 223 NLRB 1451 at 1453.

[8] *West Suburban Hospital,* 224 NLRB 1349.

[9] *Hebrew Rehabilitation Center for the Aged,* 230 NLRB No. 35.

[10] *Sinai Hospital of Detroit, Inc.,* 226 NLRB No. 61.

[11] See also *Eskaton American River Healthcare Center,* 225 NLRB 755.

workers, maintenance mechanics, electricians, gardners, groundsmen, carpenters, painter/plasters, plumbers, boiler men, watch engineers and chauffeurs employed by the Employer at its Rockville Centre, New York location, excluding all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the units found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are those in the units who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months

before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by International Union of Operating Engineers, Local 30-30A, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 3 copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 16 Court Street, Brooklyn, New York 11241 on or before November 18, 1977. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, D.C. 20570. This request must be received by the Board in Washington by November 25, 1977.

Dated: November 11, 1977 at Brooklyn, New York.

/s/ Samuel M. Kaynard
SAMUEL M. KAYNARD
Regional Director, Region 29
National Labor Relations Board
16 Court Street
Brooklyn, New York 11241

APPENDIX E

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD

Case 6—CA—8026

ALLEGHENY GENERAL HOSPITAL

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 95-95A, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On July 19, 1977, a three-member panel of the Board issued a Decision and Order in the above-entitled proceeding,[1] finding (1) it was proper to extend comity to the certification by the Pennsylvania Labor Relations Board (PLRB) of the Charging Party as the bargaining representative of Respondent's maintenance department employees; (2) Respondent, on and after December 4, 1974, unlawfully refused to bargain with the Charging Party; and (3) the strike of January 20, 1975, by Respondent's maintenance department employees was caused by that unlawful refusal and was therefore an unfair labor practice strike. A bargaining order was issued and the strikers were ordered reinstated as unfair labor practice strikers. Subsequently, the full Board

[1] 230 NLRB 954 (Member Penello dissenting).

decided to reconsider this Decision and Order in light of the recent decisions by the United States Court of Appeals for the Third District in *Memorial Hospital of Roxborough* v. *N.L.R.B.*[2] and *St. Vincent's Hospital* v. *N.L.R.B.*[3]

In *Memorial Hospital of Roxborough* v. *N.L.R.B.*, the court held that the extension of comity to a PLRB certification where, as here, the parties had contested the underlying unit determination was contrary to the Act. We respectfully disagree with that holding and believe that the circumstances of this case demonstrate why the Board's policy regarding comity is consistent with the Act.

In *St. Vincent's Hospital* v. *N.L.R.B.*, the court decided that the legislative history of the 1974 amendments to the Act[4] specifically the statement in the accompanying Senate and House committee reports that "[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry" [5] and the explanations of

[2] 545 F.2d 351 (1976).

[3] 567 F.2d 588 (1977).

[4] Prior to 1974, Sec. 2(2) excluded "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" from the statutory definition of "employer." The 1974 amendments eliminated this exemption. Public Law 93-360, 88 Stat. 395 (effective August 25, 1974).

[5] S. Rept. 93-766, 93d Cong. 2d Sess. 5 (1974), "Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974" (hereinafter Leg. Hist.) at 12; H. Rept. 93-1501, 93d Cong. 2d Sess. 6-7 (1974), Leg. Hist., *supra* at 274-275.

it offered by certain sponsors of the amendments, precluded the Board from finding appropriate separate units of maintenance and powerhouse employees at health care institutions. For support, the court cited the Board's decisions in *Shriners Hospitals for Crippled Children*[6] and *The Jewish Hospital Association of Cincinnati d/b/a Jewish Hospital of Cincinnati.*[7] After carefully reconsidering the legislative history of the 1974 amendments, we have concluded, that, with all due respect to the court, Congress did not intend to prohibit such units. Further, in *Shriners* and *Jewish Hospital of Cincinnati*, majorities of the Board agreed that legislative history did not do so.[8] Also in its decision in *St. Vincent's Hospital* v.

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[6] 217 NLRB 806 (1975).

[7] 223 NLRB 614 (1976).

[8] The court stated in *St. Vincent's Hospital* v. *N.L.R.B.*, 567 F.2d at 592:

> The Board rejected a petition for representation of five stationary engineers in Shriners Hospitals. Although it recognized that under ordinary circumstances similar units had been approved in other industries, the Board stated that ordinary circumstances do not exist in the hospital field. The majority concluded:
>
> "It is in the context of the peculiar nature of the industry and the congressional mandate against the proliferation of bargaining units that we have weighed all of the criteria traditionally considered when making a unit determination and have, on balance, concluded that it is proper to place special significance on the high degree of integration of operations performed throughout a health care facility.
>
> Were we to adopt the rationale applied by our dissenting colleagues, we could be faced with requests to find

N.L.R.B., the court went on to conclude that the legislative history of the 1974 amendments also pre-

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> appropriate dozens of separate units of employees performing diverse professional, technical, and service and maintenance functions in an industry which, by its very nature, requires great numbers of employees in a myriad of classifications all ultimately involved in providing patient care. We shall not do so, because such an approach can only lead to an undue fragmentation of bargaining units in the health care industry which would totally frustrate congressional intent." 217 NLRB 806, 808 (1975).
>
> Subsequently, in *Jewish Hospital Association*, 223 NLRB 614 (1976), the Board rejected a bargaining unit composed only of engineering employees and approved one composed of all maintenance and service personnel.
>
> We consider these statements to be correct expressions of the law properly recognizing the considerations to be applied by the Board. We are unable to reconcile the decisions and their rationale with the result reached in the case *sub judice*.

The *Shriners* majority the court refers to consisted of Members Kennedy and Penello. Then Chairman Murphy and then Member Fanning, in their dissent, and Member Jenkins, in his concurrence, specifically rejected the rationale quoted above by the court. Member Jenkins joined Members Kennedy and Penello in dismissing the petition, but only because he found the unit inappropriate under his view of the facts of that case. Chairman Murphy and Member Fanning would have found the petitioned-for unit appropriate.

In *Jewish Hospital of Cincinnati*, the entire Board, including Member Penello (Member Kennedy's term had since expired), agreed that the legislative history did not bar all maintenance units at health care institutions. Members Jenkins, Penello, and Walther decided, however, that on the particular facts of that case a separate maintenance unit was not warranted. That case, however, cannot be read as holding that as a matter of law all hospital maintenance units are precluded by the 1974 amendments.

cluded the Board from relying on its traditional community-of-interest criteria in making unit determinations in the health care industry.[9] On this point, too, we must respectfully disagree.

I.

That Congress did not intend to preclude the Board from finding appropriate units limited to hospital maintenance departments is, we believe, clear. In *Jewish Hospital of Cincinnati*, the entire Board agreed in this point:[10]

> As we have recognized and continue to recognize, our consideration of the issues related to the composition of bargaining units in the health care industry must necessarily take place against the background of avoidance of undue proliferation. However, Congress left the matter of the

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[9] The court stated:

> The Board decided to apply traditional standards which recognize that units of licensed boilermen may constitute separate appropriate units.
>
> The legislative history of the health care amendments, however, makes it quite clear that Congress directed the Board to apply a standard in this field that was not traditional. . . .
>
> * * * *
>
> A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with congressional intent to treat this unique field in a special manner. [567 F.2d at 592.]

[10] 223 NLRB at 616.

> determination of appropriate units to the Board, and the desire for nonproliferation does not, in our judgment, necessarily preclude our granting maintenance units in the health care area. Congress was aware that the Board has sometimes found that a separate maintenance unit is appropriate if the maintenance employees possess a community of interest sufficiently separate and distinct from the broader community of interest sufficiently separate and distinct from the broader community of interest they share with other employees to warrant their inclusion in a separate unit. Yet, it did nothing to preclude our granting such units. Congress in fact rejected Senator Taft's suggestion that maintenance employees should always be combined with service employees into a single unit.[11]

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[11] S. 2292, 93d Cong., 1st Sess. (1973), introduced earlier by Senator Taft, would have amended Sec. 9(b) to provide:

> [T]he Board shall not decide that any unit in a health care institution is appropriate for purposes of collective bargaining which (i) includes professional employees unless all of the professional employees employed by such institution are included therein; or (ii) includes technical employees (as defined from time to time by the Board) unless all of the technical employees employed by such institution are included therein; (iii) includes clerical employees unless all of the clerical employees employed by such institution are included therein; or (iv) includes service and maintenance employees—which shall be defined to include all employees except (A) professional, technical, and clerical employees and (B) any individual employed as a guard . . . unless all of the service and maintenance employees employed by such institution are included therein. . . . [Leg. Hist., *supra* at 108-109.]

The Court of Appeals for the Second Circuit has agreed with this conclusion,[12] The logic of *Jewish Hospital of Cincinnati* dictates that the same conclusion be reached with respect to powerhouse units of health care institutions.[13]

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[12] *Long Island College Hospital* v. *N.L.R.B.*, 566 F.2d 833, 844, fn. 4 (1977). There, the court said:

> We agree with this conclusion. Moreover, the preamendment NLRB health care cases cited favorably in the legislative history of the 1974 amendment do not call for a different result. Two of the three cases are not determinative of the skilled maintenance unit issue, as they involved NLRB rejection of even narrower units than those as issue here. See *Woodland Park Hospital*, 205 NLRB 888 (1973) (x-ray technicians); *Four Seasons Nursing Center*, 208 NLRB 403 (1974) (2-man unskilled maintenance unit). In the third case, *Extendicare of West Virginia, Inc.*, 203 NLRB 1232 (1973), the union sought three separate units—for licensed practical nurses (LPN's), technical employees, and service and maintenance employees. The employer contended that the only appropriate unit was a single all-employee unit. The NLRB approved 1) a separate LPN unit, and 2) a service and maintenance unit including technicals but excluding office clericals. As the issue of a separate maintenance-only unit was not before the Board, *Extendicare* did not raise the same issue as the instant case. Moreover, while the legislative history clearly approved *Woodland Park* and *Four Seasons*, its reference to *Extendicare* was obscure at best: "We do not necessarily approve all of the holdings of that decision." Sen. Rep. No. 93-766, 93d Cong., 2d Sess. 5 (1974), Legis. Hist., *supra*, at 12; H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974), Leg. Hist., *supra*, at 274-75.

[13] This conclusion is further supported by the remarks of Congressman Thompson, quoted *infra*.

We think it is also clear that Congress intended that we should rely on our traditional community-of-interest criteria in making unit determinations in the health care industry. Under Section 9(b),[14] the issue is whether the petitioned-for unit is appropriate for the purposes of collective bargaining. To determine this, the Board must decide whether the unit sought is composed of employees who will share similar collective-bargaining objectives; a so-called community of interest must exist. There are certain criteria the Board has traditionally considered to determine the existence of this requisite community of interest; these include similarity of wages and hours, extent of common supervision, frequency of contact with other employees, degree of interchange and functional integration with other employees, and area practice and patterns of bargaining.[15] If Congress had wanted to preclude the Board from using traditional criteria in making unit determinations in the health care industry, it could have easily amended section 9(b) to so provide. Indeed, it had the opportunity to do so, i.e., it could have adopted the ap-

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[14] Sec. 9(b) states:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

[15] See 3 NLRB Ann. Rep. 157 (1938). See, generally, *Kalamazoo Paper Box Corporation*, 136 NLRB 134, 137 (1962).

proach of Senator Taft in S. 2292.[16] What was not amended, however, was not meant to be changed.[17] As Senator Williams stated, in referreding to the amendments, "[I]n this carefully tailored legislation, Congress decided to treat the health care industry uniquely in certain respects. *It decided to go so far, and no more. . . .*" (Emphasis supplied.)[18]

Congress believed, however, that the Board should consider the proliferation problem as a factor in making unit determinations in the health care industry and that it was not necessary to amend Section 9(b) in order for the Board to do so. In developing an approach to take to unit issues int he industry, therefore, the threshold issue was to decide what Congress meant by "proliferation." Here, we looked at the statements of the sponsors of the amendments to help explain the language of the committee reports.

Senator Taft expressed his views about proliferation this way:[19]

> The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care

[16] Fn. 11, *supra*.

[17] Elsewhere, Congress amended the Act to accommodate the special needs of the health care industry, e.g., the notice provisions of Sec. 8(d) were changed and Sec. 8(g) was added.

[18] Leg. Hist., *supra* at 364. See also *Beth Israel Hospital* v. *N.L.R.B.*, 98 S.Ct. 2463, 84 LC ¶ 10,655 (1978).

[19] 120 Cong. Rec. S. 6940 (1974), Leg. Hist., *supra* at 113-114.

institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care. The provisions of S. 2292 placed a statutory limit of four bargaining units in a health care institution. While this precise approach was not adopted by the committee, report language was agreed upon to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution. The report on page 5 states:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 5 , 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 341 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).

I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to juris-

dictional disputes and work stoppages must be prevented.

The administrative problems from a practical operational viewpoint and labor relations viewpoint must be considered by the Board on this issue. Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard.

Senator Williams further explained: [20]

[T]he National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.

While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. (*N.L.R.B.* v. *Delaware-New Jersey Ferry Co.*, 123 F.2d 130 (3d Cir. 1942).)

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[20] 120 Cong. Rec. S. 12104 (1974), Leg. Hist., *supra* at 362-363.

Congressman Thompson added: [21]

With respect to the question of bargaining units, the committee stresses its concern with preventing an *undue* proliferation of bargaining units in the health care industry. The committee cited certain Board decisions in the health care industry which would reflect the statutory mandates. By so doing, however, the committee did not intend to foreclose the Board from continuing to determine traditional craft and departmental units, such as stationary engineers in the health-care field.

The *St. Vincent's* court concluded that the term "proliferation" was intended to reflect an assessment that the Board's approach to the industrial sector had allowed for an undue number of bargaining units.[22]

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[21] 120 Cong. Rec. E4899 (daily ed., July 22, 1974). We belive these post-passage remarks are relevant to the issue of what Congress meant by proliferation, especially as Congressman Thompson was a cosponsor of the 1974 amendments (compare *General Service Employees Union Local 73, affiliated with Service Employees International Union, AFL-CIO* [*A-1 Security Service Co.*] v. *N.L.R.B.*, 578 F.2d 361 (D.C. Cir. 1978) court's reference to Senator Goldwater's remarks), but would reach the same conclusions without reference to them. Further, *Regional Railroad Reorganization Act Cases*, 419 U.S. 102 (1974), cited by the dissent, is not on point. There, the post-passage remarks at issue were being used to contradict the congressional intent that had been expressed prior to passage. *Id.* at 132. Here, there is no conflict between Congressman Thompson's remarks and those of Senators Taft and Williams.

[22] The court stated:

Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation

As his remarks show, however, Senator Taft was thinking of a unit pattern similar to that of the construction industry, where employees have been grouped into units according to craft skills and job functions.[23] If the pattern of the construction industry were used as a model for the health care industry, health care employees would be grouped into units according to "*each* professional interest and job classification." (Emphasis supplied.) That is what the Senator wanted the Board to avoid.

We also believe Senator Taft's reference to "other industries"" necessarily refers to industries organized like the construction industry. For example, to a certain extent, newspaper employees have traditionally been grouped into units according to craft, see, e.g., *Sufsun Co. Inc.*, 174 NLRB 977 (1969) (separate units of photoengravers, pressmen, and

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in the health care field has aroused legislative apprehension. The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blue print Congress desired in a hospital. [567 F.2d at 592.]

[23] See, generally, *R. B. Butler, Inc.*, 160 NLRB 1595 (1966), and the cases cited therein. There, the Board stated at 1599:

> In the construction industry, collective bargaining for groups of employees identified by function as well as those groups identified by craft skills has proven successful and has become an established accommodation to the needs of the industry and of the employees so engaged.

The construction industry had been substantially organized before the Board took jurisdiction over it. See, generally, I Leg. Hist. 423 (1959) (Labor-Management Reporting and Disclosure Act).

stereotypers) and job function, see, e.g., *Knoxville News-Sentinel Company, Inc.*, 138 NLRB 782 (1962) (mailers). To interpret this phrase as a reference to the Board's general unit approach to the industrial sector, as the court and the dissent do, would create a direct conflict between Senators Taft and Williams regarding the meaning of the word "proliferation." This is because Senator Williams, as indicated, believed the Board had "as a rule" avoided unnecessary proliferation. What else would the phrase "as a rule" refer to, if not to the industrial sector, where the bulk of the Board's unit determinations are made? Therefore, to read Senator Taft's phrase "other industries" as the dissent does would mean that, while Senator Williams was explaining that the Board had as a rule not created too many industrial units, Senator Taft was saying the exact opposite. We doubt that the two chief sponsors of the 1974 amendments would disagree about the meaning of such an important term.

Thus, while accepting his colleagues' judgment that a bill allowing for only hospitalwide professional, technical, service and maintenance, and office clerical units did not afford the Board sufficient flexibility under Section 9(b), Senator Taft did not want the Board to adopt an approach that would lead to the other extreme, i.e., a unit pattern where each professional group and job classification at a hospital was separately represented. At the same time, neither the Senator nor Congress intended that every

unit limited to a single professional group or job classification should be held *per se* inappropriate.[24] Congressman Thompson's remark, quoted above, reemphasized this point. The remark, just quoted, by Senator Williams also shows that Congress intended that the appropriateness of health care units should be determined by the Board's traditional community-of-interest criteria; by what other criteria could a "notable disparity of interests" be established?

The *St. Vincent's* court, however, believed the application of these traditional criteria would lead to "proliferation." As indicated above, we disagree with the court on what Congress meant by this term. Despite this, the court did raise a critical issue: Has the Board prevented proliferation to the extent Congress wished? A review of our decisions will demonstrate that, in our judgment, we have.

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[24] The dissent also asserts that we cannot consider the failure of the Senate Labor Committee to adopt the unit approach of S. 2292 to help ascertain legislative intent. This is a puzzling assertion. The unit approach of S. 2292 "was not adopted by the committee," as Senator Taft acknowledged; rather, a "constructive compromise" was reached, i.e., the language of the committee report, which permitted the Board some "flexibility." Clearly, the meaning of this compromise can only be understood by reference to S. 2292. Also, *U.S.* v. *Price*, 361 U.S. 304 (1960), cited by the dissent, is completely inapposite. There, the Court refused to draw any inference from the failure of Congress to act on a proposal that would have reversed an appellate court's interpretation of a provision of the Revenue Act. The circumstances of *Price* are clearly not analogous to those here.

II.

The initial lead cases regarding health care institutions involved a variety of units. Oral arguments was held for six of these cases: *Mercy Hospitals of Sacramento,*[25] *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.,*[26] *Newington Children's Hospital,*[27] *Sisters of St. Joseph of Peace,*[28] *Duke University,*[29] and *Mount Airy Foundation, d/b/a Mount Airy Psychiatric Center.*[30] Two other cases, *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*[31] and *Shriners Hospitals for Crippled Children,*[32] were also decided along with these six.

Beginning with the analysis of the legislative history described above, a majority of the Board decided to apply traditional community-of-interest criteria to decide the unit issues raised by these initial cases. Application of these criteria led the Board majority to conclude that the Board's unit approach to the industrial sector would also suit the health care industry, i.e., satisfy the policy objective of Section

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[25] 217 NLRB 765 (1975).

[26] 217 NLRB 787 (1975).

[27] 217 NLRB 793 (1975).

[28] 217 NLRB 797 (1975).

[29] 217 NLRB 799 (1975).

[30] 217 NLRB 802 (1975).

[31] 217 NLRB 775 (1975).

[32] 217 NLRB 806 (1975).

9(b)—to guarantee employees the fullest freedom to exercise the rights granted by the Act—and avoid proliferation. Before explaining our lead decisions, some background about the Board's general treatment of industrial sector units is necessary.

For unit purposes, regardless of industry, the Act distinguishes between professional and nonprofessional employees.[33] Thus the first proviso to Section 9(b) entitles professional employees to separate representation, apart from nonprofessionals.[34] This proviso, however, does not require that an employer's entire professional work force be grouped together in a single unit,[35] and units that include only a segment of an employer's professional work force may be found appropriate.[36] Such units, however, must be an identifiable group with a community of interest that is separate, or distinct, from the excluded professionals.[37]

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[33] Sec. 2(12) defines the term "professional employee."

[34] Sec. 9(b)(1) states:

> [T]he Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

[35] *Westinghouse Electric Corporation (Elevator Division)* v. *N.L.R.B.*, 236 F.2d 939 (3d Cir. 1956).

[36] See *Douglas Aircraft Company, Inc.*, 157 NLRB 791 (1966); see also *Fordham University*, 193 NLRB 134 (1971).

[37] *Id.* Cf. *General Electric Company*, 148 NLRB 1660 (1964).

Industrial sector nonprofessionals are traditionally divided into three broad categories: production (or service) and maintenance, technical, and office clerical. The Board has generally found that, because the employees within each of these three categories usually possess a separate community of interest,[38] separate plantwide units of production (or service) and maintenance employees,[39] technicals,[40] and office clericals[41] are appropriate. Units limited to a segment a plant's office clericals or technicals may also be appropriate. Here, too, however, the employees in such units must constitute an identifiable group with a community of interest that is separate or distinct from the other unrepresented office clericals[42]

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[38] See, e.g., *Southern California Gas Company*, 10 NLRB 1123, 1138 (1939); *Litton Industries of Maryland, Incorporated*, 125 NLRB 722, 724-725 (1959); *The President and Directors of Georgetown College for Georgetown University*, 200 NLRB 215 (1972). See also *The Sheffield Corporation*, 134 NLRB 1101 (1961).

[39] A unit of production and maintenance employees is presumptively appropriate. *The Kroger Company*, 155 NLRB 546, 550 (1965). See *The President and Directors of Georgetown College for Georgetown University, supra*, fn. 38.

[40] E.g., *United Shoe Machinery Corporation, Beverly Manufacturing Division*, 185 NLRB 200 (1970).

[41] E.g., *John H. Harland Company*, 127 NLRB 588 (1960).

[42] See *Safeway Stores Incorporated*, 174 NLRB 1274 (1969); cf. *Collins Radio Company*, 206 NLRB 108 (1973); *California Physicians' Service d/b/a Californya Blue Shield*, 178 NLRB 716 (1969); *Bank of America, National Trust and Savings Association*, 174 NLRB 101 (1969); *General Electric Company*, 148 NLRB 811 (1964).

or technicals.[43] Under similar tests, units limited to a segment of an employer's production (or service) and maintenance complement may also be found appropriate, i.e., units organized according to craft, e.g., electricians,[44] or departments, e.g., maintenance[45] or boiler room.[46]

The first unit case to deal with health care professionals was *Mercy Hospitals of Sacramento.* There separate units of registered nurses and medical laboratory technologists were sought.[47] Because these units included only segments of the hospital's professional work force, the Board majority applied the test for such units described above.

The facts were these: The duties and responsibilities of registered nurses could not be delegated to other hospital employees; for accreditation purposes

[43] See *Federal Electric Corporation, Western Test Range,* 157 NLRB 1130 (1966); cf. *Astronautics Corporation of America,* 210 NLRB 650 (1974); *General Electric Company,* 173 NLRB 399 (1968); *The Bendix Corporation, Kansas City Division,* 15 NLRB 718 (1964); *Westinghouse Electric Corporation (Naval Reactors Facility),* 137 NLRB 332 (1962).

[44] See, e.g., *E. I. Dupont De Nemours and Company,* 162 NLRB 413 (1966).

[45] See *American Cyanamid Company,* 131 NLRB 909 (1961).

[46] See, e.g., *New England Confectionary Company,* 108 NLRB 728 (1954). *Empire State Sugar Company, Inc.,* 166 NLRB 31 (1967), enfd. 401 F.2d 559 (2d Cir. 1968); cf. *Marriott Hotels, Incorporated,* 187 NLRB 399 (1970).

[47] The parties stipulated that both groups of employees were professionals.

the hospital had to maintain a separately administered department of nursing, run by a director of nursing; and the control of the working conditions and hiring and firing of registered nurses was centralized with that director. Further, as a precondition of employment, registered nurses had to pass a uniform national licensing examination and acquire a state license. The Board found the above facts established the "singularity" of interests of the registered nurses and therefore granted them a separate unit.[48]

At the same time, however, the Board concluded that a unit limited to medical laboratory technologists was inappropriate under this test, and found instead that a unit of all other professionals, including medical laboratory technologists and excluding registered nurses, would be appropriate. The Board expressly did not decide (1) whether a unit limited to physicians was appropriate or (2) whether registered nurses would automatically be included with other professionals when no union was seeking to represent them separately.[49]

Since *Mercy Hospitals of Sacramento,* the Board has continued to apply the same test to unit issues

[48] Significantly, nothing said during the 1974 debates indicated that Congress would have disapproved of such a unit; rather, keying into the statement, quoted above, by Senator Williams, the opposite seemed true.

[49] Subsequently, the Board decided not to include registered nurses with other professionals automatically. *Dominican Santa Cruz Hospital,* 218 NLRB 1211 (1975).

involving professionals. The Board has continued to apply the same test to unit issues involving professionals. The Board has found appropriate a professional unit that excluded both registered nurses and physicians because physicians, like registered nurses, possess a separate and distinct community of interest:[50] physicians perform unique functions with respect to both actual patient care and the direction of others who also provide such care, receive extensive and specialized education and training, and are paid appreciably higher salaries than other professionals. Also under this test, however, the Board has found inappropriate units limited to psychiatrists (excluding other physicians)[51] and pharmacists.[52]

As to the nonprofessional employees, the Board initially found that hospital technicals, service and maintenance employees, and office clericals possessed separate communities of interest and therefore decided to adhere to the industrial sector's unit pattern for such employees. *Mercy Hospitals of Sacramento, Nathan and Miriam Barnert Memorial Hospital d/b/a Barnert Memorial Hospital, Newington Child-*

[50] *Ohio Valley Hospital Association*, 230 NLRB 604 (1977). See also *Montefiore Hospital and Medical Center*, 235 NLRB No. 29 (1978) (unit of doctors and dentists, the facility's only professional employees, found appropriate).

[51] *New York University Medical Center, A Division of New York University*, 217 NLRB 522 (1975).

[52] *Kaiser Foundation Hospitals*, 219 NLRB 325 (1975). Accord: *Beth Israel Hospital and Geriatrics Center*, 219 NLRB 520 (1975); *San Jose Hospital & Health Care Center, Inc., et al.*, 228 NLRB 21 (1977).

ren's Hospital, St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, and *Sisters of St. Joseph of Peace* held that separate hospitalwide units for each of these three broad employee classifications were appropriate. *Mount Airy Foundation d/b/a Mount Airy Psychiatric Center* also held that, when sought, and a community of interest existed, a unit that combined both technicals and service and maintenance employees was appropriate. However, *St. Catherine's Hospital of Dominican Sisters of Kenosha* and *Duke University* held, respectively, that units of licensed practical nurses, apart from other technicals, and switchboard operators, apart from other office clericals, were inappropriate.[53] Since these lead cases, absent a stipulation,[54] no unit that was limited to either a segment of a hospital's technicals or office clericals has been found appropriate.[55]

[53] The *Duke University* opinion stated that the switchboard operators involved there did possess a distinct community of interest. That decision, however, should be read with *St. Catherine's Hospital of Dominican Sisters of Kenosha* and *Sisters of St. Joseph of Peace*, which included switchboard operators in the office clerical units found appropriate therein, and with the cases cited at fn. 42, *supra*.

[54] *Otis Hospital, Inc.*, 219 NLRB 164 (1975).

[55] Units of laboratory and x-ray technicians, apart from other technicals, have been held inappropriate. *American Hospital Management Corp. d/b/a Mad River Community Hospital*, 219 NLRB 25 (1975) and 220 NLRB 350 (1975), and *Pontiac Osteopathic Hospital*, 227 NLRB 1706 (1977). Concededly, there was no clear articulation of the "community of the "community of interest" standard to the facts of those cases. However, these cases should be read with *Barnert*

III.

The only lead case that dealt with a unit limited to a segment of a hospital's service and maintenance work force was *Shriners Hospitals for Crippled Children.* There, the petitioner sought a unit of five stationary engineers, a traditional powerhouse unit. The decision included three different opinions. As indicated, Members Penello and Kennedy decided that because of the congressional concern with proliferation, such a unit was inappropriate. Then Chairman Murphy and then Member Fanning concluded that the legislative history did not foreclose such a unit and found that, because there was a "notable disparity of interests" between these stationary engineers and the hospital's remaining employees, the unit sought was appropriate. Finally, Member Jenkins agreed with the reading given the legislative history by Chairman Murphy and Member Fanning, but found the unit inappropriate under his view of the correct standards of community of interest for this type of case. A Board majority dismissed the petition.

About a year later, in *St. Vincent's Hospital,*[56] the full Board in effect reconsidered *Shriners.* This case

Memorial Hospital, supra, and *St. Catherine's Hospital of Dominican Sisters of Kenosha, supra,* the lead cases regarding hospital technicals. Similarly, a unit limited to a data processing department's employees, apart from other office clericals, was found inappropriate. *Seton Medical Center,* 221 NLRB 120 (1975).

[56] 223 NLRB 638 (1976).

was decided on the same day as *Jewish Hospital Association of Cincinnati d/b/a Jewish Hospital of Cincinnati,*[57] a case in which the unit sought was a maintenance unit. Because of the importance of this issue, the Board held oral argument on this latter case, along with *Riverside Methodist Hospital,*[58] *St. Joseph Hospital,*[59] and *West Suburban Hospital,*[60] cases which also involved maintenance units.

In *St. Vincent's Hospital,* the entire Board, including Member Penello, agreed that the legislative history of the 1974 amendments did not prohibit the Board from finding appropriate a unit of hospital powerhouse employees. A majority applied traditional criteria to find the unit sought was appropriate.[61]

Members Penello and Walther agreed with this result, but applied a somewhat different standard: [62]

> This standard, which is a more rigid one than is applied in other industries, can be met when the unit sought, unlike the situation in *Shriners,* is composed of licensed craftsmen engaged in traditional craft work, which is performed in a separate and distinct location apart from other employees in the health care facility. Normally,

[57] 223 NLRB 614 (1976).

[58] 223 NLRB 1084 (1976).

[59] 224 NLRB 270 (1976).

[60] 224 NLRB 1349 (1976).

[61] See cases cited at fn. 46, *supra.*

[62] 223 NLRB at 639-640.

such employees do not perform other services throughout the health care facility, as was the case in *Shriners*, and there is, at most, minimal transfer or interchange to and from the craft unit.

In *Jewish Hospital of Cincinnati*, the initial issue was whether the legislative history of the 1974 amendments required that all hospital maintenance units be rejected as inappropriate. Here, as indicated above, the entire Board agreed that Congress did not intend to preclude the establishment of all such units. The Board members did disagree about what test to apply to decide the appropriateness of health care maintenance units. Members Penello and Walther applied the standard they had set forth in *St. Vincent's Hospital.* Chairman Murphy and Member Fanning would have applied the test of *American Cyanamid Company*,[63] the lead case on maintenance units at unorganized plants in the industrial sector.[64] Member Jenkins did not state a separate position, but joined in dismissing the petition for the maintenance unit in that case. A majority comprising Members Jenkins, Penello, and Walther also dismissed the petitions in *Riverside Methodist Hospital*

[63] 131 NLRB 909 (1961).

[64] Then Chairman Murphy voted to dismiss the petition for the maintenance unit and joined Members Jenkins and Walther in directing an election in a service and maintenance unit. She did so, however, only because otherwise there would not have been a majority for any of the petitioned-for units. She made her position clear in her joint dissent with then Member Fanning in *Riverside Methodist Hospital, supra.*

and *St. Joseph Hospital.* In *West Suburban Hospital*, Member Jenkins joined Chairman Murphy and Member Fanning in finding the maintenance unit sought therein appropriate.

Although agreeing that legislative history does not preclude us from finding either a maintenance or powerhouse unit appropriate, the Board Members have disagreed about which standard to apply to determine the appropriateness of either such unit. In *St. Vincent's Hospital*, a majority of the Board decided to apply the test developed before 1974 to determine the appropriateness of the powerhouse unit sought therein. Today, Chairman Fanning and Members Murphy and Truesdale agree to apply the test of *American Cyanamid Company* to determine the appropriateness of maintenance units at health care institutions. Under *American Cyanamid Company* and the pre-1974 test for powerhouse units, the issue is essentially whether the employees sought are an identifiable group with a community of interest that is sufficiently separate or distinct from the other unrepresented service and maintenance employees to warrant separate representation.[65] For

[65] Under *American Cyanamid Company*, the separate and distinct quality of a maintenance department's community of interest is determined by considering several factors. These include the level of skill required to perform the bulk of the maintenance work involved; the amount of production employees' work, if any, the maintenance employees perform, and vice versa; the degree of interchange between production and maintenance departments; the degree of shared supervision; the location of the maintenance department. Compare

this reason, we find both tests are consistent with the approach we have taken to unit issues in the health care industry.

To summarize, our decisions have established that the following basic groupings of health care employees are appropriate for unit purposes: registered nurses, physicians, all professionals excluding registered nurses and physicians, service and maintenance, technical, and office clerical employees. These basic units are sufficiently inclusive to cover any health care institution's complement of employees. We have found appropriate only two contested units narrower than these units of powerhouse employees, i.e., stationary engineers or boiler operators,[66] and

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The Kroger Company, 155 NLRB 546 (1965); *Gerber Products Company*, 162 NLRB 121 (1966); *Crown Simpson Pulp Company*, 163 NLRB 796 (1967); *Meyers Drum Company*, 165 NLRB 1060 (1967); *Oscar Meyer & Co.*, 172 NLRB 1471 (1968); *Lily-Tulip Cup Corporation*, 177 NLRB 71 (1969); *American Can Co.*, 179 NLRB 18 (1969); cases where the Board found maintenance units appropriate, with *Dundee Cement Company*, 170 NLRB 422 (1968); *United Foods, Inc., Dulaney Foods Division*, 174 NLRB 91 (1969); *U.S. Plywood—Champion Papers, Inc.*, 174 NLRB 292 (1969); *Vincent Horwitz Company, Inc.*, 176 NLRB 496 (1969); *Alcan Aluminum Corporation*, 178 NLRB 362 (1969); *Monsanto Company*, 183 NLRB 415 (1970), cases where the Board found such units inappropriate. The fact that maintenance employees and production employees have frequent contact with each other is not, alone, sufficient to destroy the separate identity of a maintenance department. See *American Can Co., supra.*

[66] *St. Vincent's Hospital, supra; The Paul Kimball Hospital, Inc.*, 224 NLRB 458 (1976); and *Mercy Center for Health Care Services*, 227 NLRB 1814 (1977).

maintenance department employees.[67] Where maintenance units have been found appropriate, the boiler operators or stationary engineers were included.[68] As this summary should demonstrate, the approach taken by the Board to health care unit issues has prevented proliferation; the unit pattern that has emerged does not even remotely resemble the pattern of the construction industry.[69]

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[67] *West Suburban Hospital, supra; St. Francis Hospital—Medical Center*, 223 NLRB 1451 (1976); *Eskaton American River Health Care Center*, 225 NLRB 755 (1976); *Sinai Hospital of Detroit*, 226 NLRB 425 (1976); *Hebrew Rehabilitation Center for the Aged*, 230 NLRB 255 (1977); *Trinity Memorial Hospital of Cudahy, Inc.*, 230 NLRB 855 (1977); *McClean Hospital*, 234 NLRB No. 54 (1978).

[68] *Id.*

[69] If other petitions are filed at this hospital, the units sought will be subject to the same approach described above. Thus, the reviewing court should not be led to think that because this unit includes approximately 60 of 2,000 employees other units limited to such small segments of the hospital's employee complement will perforce also be found appropriate.

In *N.L.R.B.* v. *West Suburban Hospital*, 570 F.2d 213 (1978), the Court of Appeals for the Seventh Circuit, in refusing to enforce the Board's bargaining order, decided that the Board, in its underlying unit determination fn. 60, *supra*, had paid mere lip service to the congressional admonition regarding proliferation. We believe the above discussion has demonstrated that we have heeded that admonition.

After reading the dissent's accusations against us, we would have expected a greater margin of difference between us, i.e., his "approach" has allowed for only two fewer units than ours has.

IV.

Finally, we note that, applying the test of *American Cyanamid Company* to the facts found here by the PLRB,[70] we would reach the same result the PLRB did. Thus, the vast majority of the maintenance department employees are skilled craftsmen who perform craft work and must possess craft skills when hired. The less skilled maintenance employees perform tasks that are, to a significant extent, integrated with those of the skilled maintenance employees. The work of housekeeping department employees, however, involves almost no skill whatsoever. The maintenance employees also are separately supervised, and work under terms and conditions that are different from the housekeeping employees: a higher pay scale, different hours, and separate lockers and shower facilities. Further, during the 35 years preceding the hearing, only eight housekeeping employees transferred into maintenance department jobs. The amount of transfer between departments is therefore insignificant. Additionally, although maintenance employees sometimes perform tasks in tandem with housekeeping employees, they never do the work of housekeeping employees, or vice versa. Therefore, under *American Cyanamid Company* we would find this an appropriate maintenance unit, if

[70] The complete PLRB decision is attached hereto as an appendix. Before us, Respondent did not attempt to show through an offer of proof that PLRB's factual findings were erroneous.

the issue were before us *de novo*. Further, there is no question that the PLRB proceedings reflected the true desires of the affected employees. Election irregularities were also not involved, and there has been no deviation from due process requirements.[71] There is therefore no reason for refusing to extend comity here. To require another hearing to relitigate the unit issue in these circumstances would run counter to the aim of the 1974 amendments, i.e., promptly to afford to the employees of nonprofit hospitals the rights and protections of the Act that had for too long been denied them.[72]

For the reasons stated above, we therefore reaffirm the conclusions of law the Board made in its initial decision in this case. Accordingly, we also reaffirm the Order of that decision.

[71] Respondent's due process arguments are dealt with at length in our initial decision.

[72] S. Rept. 93-766, 93d Cong. 2d Sess. 3 (1974), Leg. Hist., *supra* at 10.

ORDER

It is hereby ordered that the Order in *Allegheny General Hospital*, 230 NLRB 954 (1977), be, and it hereby is, reaffirmed.

Dated, Washington, D.C. December 19, 1978

John H. Fanning, Chairman

Betty Southard Murphy, Member

John C. Truesdale, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMER PENELLO, dissenting:

On the surface, the Board simply affirms in this case its holding in a prior proceeding that comity should be granted to a certification of the Pennsylvania Labor Relations Board (PLRB) of the Charging Party as the collective-bargaining representative of a unit limited to employees of Respondent Hospital's maintenance department, and its finding that Respondent violated Section 8(a)(5) and (1) of the Act in refusing to bargain with the Charging Party over the wages, hours, and other terms and conditions of employment of the employees in the unit.[73] But the deeper significance of today's decision lies in the majority's bold repudiation of Congress' directive to the Board to avoid proliferation of bargaining units in the health care industry,[74] and its unconcealed de-

[73] 230 NLRB 954 (1977) (myself dissenting). The Board also found that a strike commenced in protest of Respondent's refusal to bargain was an unfair labor practice strike, and ordered Respondent to bargain with the Charging Party and, upon application, to reinstate the strikers to their former, or substantially equivalent, positions. I dissented on the ground that the PLRB certification should not be given comity because the bargaining unit was not appropriate.

[74] S. Rept. 93-766, 93d Cong. 2d sess. 5 (1974), "Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (hereinafter Leg. Hist.) at 12; H. Rept. 93-1501, 93d Cong. 2d sess. 6-7 (1974), Leg. Hist., *supra* at 274-275. Though at times my colleagues seem to acknowledge the existence of the legislative mandate against unit proliferation in health care institutions, it is evident from a reading of their entire opinion that these references amount to no more than what one court of appeals

termination to find bargaining units appropriate in this field on the same basis it would in any other industry. I commend my colleagues for their candor in announcing this intention. However, I forcefully disagree with their approach, founded as it is upon misinterpretation of legislative history, improper reliance upon "post-passage" personal remarks of one legislator, misleading discussion of Board and court cases, and astonishing assertions that application of traditional principles of unit determintion have prevented, and will prevent, the mushrooming of bargaining units in health care institutions.

I.

In 1974, Congress removed the statutory exemption from our jurisdiction enjoyed since 1947 by nonprofit hospitals,[75] finding "no acceptable reason why 1,427,012 employees of these non-profit, non-public hospitals, representing 56% of all hospital employees, should continue to be excluded from the coverage and protections of the Act." [76] At the same time, however, the House and Senate "recognized that the needs of patients in health care institutions required special consideration in the Act. . . ." [77] Having in mind the

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has aptly characterized as "mere lip-service mention." *N.L.R.B.* v. *West Suburban Hospital*, 570 F.2d 213, 216 (7th Cir. 1978).

[75] P.L. 93-360, 88 Stat. 395.

[76] Leg. Hist., *supra* at 10.

[77] *Id.* In a new Sec. 2(14) of the Act, Congress defined the term "health care institution" to include facilities other than

disruption in the delivery of health care services to patients likely to be caused by work stoppages, Congress amended Section 8(d) of the statute to provide, where collective bargaining involves employees of a health care institution, that earlier notice of termination or modification of an existing contract be tendered to the other party and to the Federal Mediation and Conciliation Service (FMCS), that a labor organization give 30 days' notice of the existence of a dispute to FMCS where bargaining is for an initial contract, and that, in either case, the parties submit to mandatory mediation by FMCS. To the same end, Section 8(g), which requires that labor organization notify a health care institution 10 days in advance of a strike or picketing, was added to the Act.

But congressional concern with insuring uninterrupted patient care at health care institutions did not stop with enacting these special notice and mediation requirements for use when the immediate prospect of a work stoppage looms. The legislators desired as well to limit the *incidence* of strikes and work stoppages by instructing the Board to minimize the number of bargaining units in this industry. Congress understood that the risk of disruptive work stoppages in a health care facility would be increased the larger the number of bargaining units, primarily because of the heightened possibility of jurisdictional

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nonprofit hospitals: ". . . any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person [sic]."

disputes among competing unions and the traditional reluctance of many employees to cross picket lines erected even by unions other than their own. Rather that placing a statutory restriction upon the type and number of bargaining units which would be appropriate in a health care institution, Congress decided to achieve the same goal of unit limitation by inserting the following passage in the House and Senate Committee Reports: [78]

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

[1] By our reference to *Extendicare*, we do not necessarily aprove all of the holdings of that decision.

For the sake of convenient reference, I will also set forth here comments made by Senators Taft and Williams explaining this paragraph. These remarks of the Senate cosponsors of the 1974 amendments to history.

Senator Taft stated:

> The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care. The provisions of S. 2292 [a bill introduced by Senator Taft but not acted upon by Congress] placed a statutory limit of four bargaining units in a health care institution. While this precise approach was not adopted by the committee, report language was agreed upon to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution. . . .
>
> I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.
>
> The administrative problems from a practical operational viewpoint and labor relation [sic] viewpoint must be considered by the Board on this issue. Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard. In analyzing the issue of bargaining units, the Board should also consider the issue of the cost

[78] Leg. Hist., *supra* at 12 and 274-275.

of medical care. Undue unit proliferation must not be permitted to create wage "leapfrogging" and "whipsawing." The cost of medical care in this country has already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors.

The committee, in recognizing these issues with regard to bargaining unit determination, took a significant step forward in establishing the factor of public interest to be considered by the Board in unit cases.[79]

Senator Taft also stated:

> As to the issue of bargaining units, I would like to clarify that my omission in my opening remarks to mention the footnote to the Extendicare case in the committee report, certainly was accidental. As stated in the committee report:
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> > By our reference to Extendicare, we do not necessarily approve all the holdings of that decision.
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> Part of the unit findings in that case, it can be argued, was overly broad and not consistent with minimization of the number of bargaining units in health care institutions. Certainly, every effort should be made to prevent a proliferation of bargaining units in the health care field and this was one of the central issues leading to agreement on this legislation. In this area there is a definite need for the Board to examine the public interest in determining appropriate bar-

[79] *Id.* at 113-114.

gaining units. *NLRB* v. *Delaware-New Jersey Ferry Co.*, 128 F.2d 130 (3rd. Cir. 1942).[80]

Senator Williams stated:

> [T]he National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.
>
> While the committee clearly intends that the Board gave due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargain [sic] units. (*NLRB* v. *Delaware-New Jersey Ferry Co.*, 128 F.2d 130 (3d Cir. 1942)).[81]

Although the majority refers to certain remarks made by Representative Thompson, a sponsor of the health care amendments in the House, these comments may not properly be considered part of the legislative history. Representative Thompson's state-

[80] *Id.* at 255.

[81] *Id.* at 362-363.

ments appear in the Congressional Record of July 22, 1974—11 days after final approval of the legislation.[82] The Supreme Court has ruled that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress" expressed before the passage of a law, and that comments such as those of Congressman Thompson represent only personal views.[83] The Board is therefore bound not to take these statements into consideration in interpreting the Act.

Another bit of "non-legislative history" relied upon by the majority, as well as by the Board in some cases,[84] involves congressional failure to enact S. 2292, a bill introduced by Senator Taft while the 1974 revisions to the Act were under consideration, which would generally have limited bargaining units in health care institutions to four specified types.[85] Con-

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[82] 120 Cong. Rec. E.4899 (daily ed., July 22, 1974).

[83] *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 132 (1974).

[84] See, e.g., *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center,* 217 NLRB 775, 777, fn. 25 (1975); *The Jewish Hospital Association of Cincinnati d/b/a Jewish Hospital of Cincinnati,* 223 NLRB 614, 616 (1976).

[85] Leg. Hist., *supra* at 108-109. The units were (1) professional employees, (2) technical employees, (3) clerical employees, and (4) service and maintenance employees. The bill also provided that existing bargaining units in health care institutions would not be disturbed, and that units other than the basic four would be appropriate if agreed upon by the parties. A separate unit of guards would also be required by Sec. 9(b)(3) of the Act.

trary to the majority, the bill was not "rejected" by the Senate or House and no inference regarding legislative intent may properly be drawn from congressional inaction.[86]

II.

To determine whether a group of employees constitutes a unit appropriate for purposes of collective bargaining, the Board has historically utilized its "community of interest" test.[87] My colleagues say that "[i]t is . . . clear that Congress intended that we should rely on our traditional community-of-interest criteria in making unit determinations in the health care industry." This is not clear to me; indeed, I find only evidence to the contrary. Framed in the simplest terms, if Congress had wanted the Board to employ only its usual community-of-interest standard in deciding appropriate units in health care, institutions, there would have been no need to caution the Board in the committee reports to avoid proliferation of health care bargaining units. As

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[86] See *U.S.* v. *Price,* 361 U.S. 304 (1960).

[87] In applying this standard, we evaluate the mutuality of interest in wages, hours, and working conditions among employees; commonality of qualifications, training, and skills; frequency of contact and degree of interchange with other employees; frequency of transfer to and from the unit under consideration; commonality of supervision; degree of integration with the work functions of other employees; area practice and patterns of collective-bargaining; as well as any history of bargaining involving the employees who would be included in the unit. See, in general, *Kalamazoo Paper Box Corporation,* 136 NLRB 134 (1962).

phrased by Senator Taft, the congressional mandate against multiplication of bargaining units in this field forms a "factor of public interest," beyond that of community of interest among employees, which the Board is required to take into account when making decisions about the appropriateness of units in a health care institution. My review of the cases cited by Congress in the paragraph regarding bargaining units in the committee reports, together with the comments of Senators Taft and Williams, leaves me free from doubt that consideration by the Board of this "factor of public interest" necessitates finding inappropriate in the health care field units which might be acceptable in other industries.

Congress directly approved in the committee reports the holdings of the Board in *Woodland Park Hospital, Inc.*,[88] and in *Four Seasons Nursing Center of Joliet*.[89] In *Woodland Park*, the Board refused to grant a requested unit of x-ray technicians in a for-profit hospital, recognizing that to permit such separate representation would "lead to severe fragmentation of units in the health care industry." [90] Likewise, the Board found inappropriate a separate unit of less skilled maintenance employees in a nursing home in *Four Seasons*. Most significant, however, was congressional endorsement of "the trend toward broader units," as exemplified by *Extendicare of West*

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[88] 205 NLRB 888 (1973).

[89] 208 NLRB 403 (1974).

[90] 205 NLRB at 889.

Virginia, Inc., d/b/a St. Luke's Hospital.[91] In that decision, the Board declined to allow a separate unit of technical employees, apart from an overall service and maintenance unit, at a for-profit hospital. Although the Board did accord separate representation to licensed practical nurses (LPNs) in the same case, Congress disagreed with our creation of an LPN unit: "By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision." [92] According to Senator Taft, this sentence was inserted in the committee reports to indicate that the Board's LPN unit finding "was overly broad and not consistent with minimization of the number of bargaining units in health care institutions." [93]

Viewed in the narrowest sense, the citation of *Woodland Park*, *Four Seasons*, and *Extendicare*, reflects congressional disapproval of separate units of x-ray technicians, less skilled maintenance employees, technical employees, and licensed practical nurses. But the reference to these three decisions also discloses a deeper and more general concern on the part of Congress that the Board take care to limit the number of bargaining units in health care facilities. Congress underscored this concern by indicating its preference for the broadest possible unit combination of employees in each of the cases mentioned.

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[91] 203 NLRB 1232 (1973).

[92] Leg. Hist., *supra* at 12, fn. 1, 275, fn. 1.

[93] *Id.* at 255.

The remarks of Senators Taft and Williams, reproduced at length earlier in this opinion, confirm the intention of Congress respecting determination of appropriate bargaining units in the health care industry. Senator Taft noted that the language of the committee report "was agreed upon to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution," and emphasized that "every effort should be made to prevent a proliferation of bargaining units in the health care field." The Senator stated that "unwarranted unit fragmentation . . . must be prevented," and warned that, "Health-care institutions must not be permitted to go the route of other industries, particularly the construction trades, in this regard." Senator Taft spoke also of "the importance of great caution being exercised by the Board in reviewing unit issues in this area." Senator Williams commented that "the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry." Although Senator Williams indicated that bargaining history or a "*notable* disparity of interests between employees in different job classifications" (emphasis supplied) might, in some circumstances, justify according separate representation to a group of employees, it is certain he did not mean that the Board was at liberty to grant units in the health care industry on the basis solely of its usual community-of-interest criteria. Indeed, the Senator said very plainly that Board unit decisions in the

health care industry would have to be made within the "framework" of the congressional mandate against unit proliferation.

III.

The preceding analysis of legislative history leads ineluctably to the conclusion already stated that the Board must keep in mind the public interest in unit limitation, in addition to its traditional community-of-interest criteria, when deciding upon appropriate units in the health care industry. Senator Taft stated in his legislative comments that no specific statutory restriction was imposed upon the number of bargaining units in a health care institution to allow the Board some flexibility in arriving at unit determination. It was thus left for the Board to fashion a practical test, which takes into account traditional principles as well as the congressional nonproliferation mandate, for establishing bargaining units in this field. In consequence, I have found to be appropriate units less comprehensive than all professional employees or all nonprofessional employees, where the record disclosed that the employees in the requested unit enjoyed an exceptionally strong community of interest among themselves—significantly greater than that which would normally justify separate representation in other industries.[94] This test, in my esti-

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[94] See, e.g., *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975) (separate units of registered nurses and business office clericals) (subsequently, the petitions for these two units were withdrawn, *Mercy Hospitals of Sacramento, Inc.*,

mation, is consistent with Senator Williams' remark that a "notable" disparity of interests among different groups of employees in a health care facility might make separate representation permissible. It also assigns proper weight both to our historical community-of-interest criteria and to the congressional admonition against bargaining unit proliferation in health care institutions.

I can therefore readily agree with my colleagues that Congress did not intend to "preclude" the Board from using traditional principles in making unit determinations in the health care industry. But I cannot follow them to the untenable conclusion that Congress intended that the Board apply exclusively its customary community-of-interest test in deciding upon appropriate units in this area. In fact, reading the majority opinion, one receives the anomalous impression that Congress desired that the Board ignore the legislative history of the health care amendments respecting unit proliferation.

To support their remarkable construction of the legislative history, the members of the majority seize principally upon this remark of Senator Taft: "Health-care institutions must not be permitted to go the route of other industries, particularly the con-

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224 NLRB 419, 420, fn. 3 (1976); and my concurring opinion in *St. Vincent's Hospital,* 223 NLRB 638 (1976), affd. in the summary judgment proceeding, 227 NLRB 544 (1976), enforcement denied 567 F.2d 588 (C.A. 3, 1977) (craft unit of boiler operators). These and other decisions will be discussed in sec. IV, *infra.*

struction trades, in this regard," referring to unit fragmentation. This is interpreted to mean that the Board may design any unit pattern it pleases for health care facilities, so long as it does not resemble that of the construction industry or, for some reason, the newspaper and printing industry. Yet, any impartial reading of the sentence quoted discloses that it refers generally to the necessity of not duplicating the unit mold of other industries in the health care field, and cites the construction trades only as a particularly undesirable example of unit proliferation. Furthermore, it is not likely that Senator Taft had in mind only industries such as construction and printing, because special craft skills possessed by disparate groups of employees, as well as historical organization along these lines, dictated the creation of numerous separate units in these trades.[95] In contrast, the health care industry was predominantly unorganized before passage of the 1974 amendments and, with rare exceptions, health care employees do not possess distinct craft skills. Thus, application of the normal community of interest standard would not call for the establishment of bargaining units in the health care industry similar to those in the construction and printing industries. For that reason, Sena-

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[95] In fn. 23, *supra,* the majority acknowledges that craft skills, combined with traditional patterns of organization, led the Board to establish a number of craft units when it assumed jurisdiction over the construction industry. The same holds true in regard to the printing trades. See, in general, *American-Republican, Incorporated,* 171 NLRB 43 (1968).

tor Taft's primary concern must have been that, left to its own devices, the Board would find the same units appropriate in a health care facility which it would in a typical industrial plant.[96]

IV.

Far from showing that the Board's unit determinations in the health care field have "prevented proliferation," the majority opinion impressively documents such proliferation and lays the groundwork for even further unit fragmentation. As recognized by the majority, Section 9(b)(1) of the statute gives professional employees the right to be represented separately from nonprofessionals. Therefore, like theirs, my discussion of the Board's health care unit determinations will take place within the context of this dichotomy.

Respecting professional employees in health care institutions, the Board, myself included, found appropriate a separate unit of registered nurses in *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765. I was persuaded that these employees possessed an

[96] Although the Board has, for instance, found appropriate separate units of skilled maintenance employees in the industrial sector, *American Cyanamid Company*, 131 NLRB 909 (1961), the Board has generally not found a separate community of interest to exist among each job classification, i.e., carpenters, plumbers, electricians, etc., within a maintenance department. Therefore, it is unlikely that Congress perceived a danger that the Board would find appropriate in the health care field narrow units based upon separate job classifications which it had not granted in the industrial sphere.

exceptionally high degree of community of interest among themselves, distinct and apart from other professionals, such as to justify according them separate representation. The overriding factor leading me to this conclusion was evidence of a strong "tradition of separate and exclusive representation and collective bargaining," for registered nurses, whereas "[s]eparate bargaining for other health care professionals, to the extent it [was]shown to exist, appear[ed] to have been on a scale of considerably smaller proportions." Subsidiary factors contributing to the creation of a separate unit for registered nurses included the requirement that, unlike other professionals, they be on duty around the clock, every day of the year; the nondelegable nature of their patient care duties; the requirement of an accrediting agency that hospitals maintain separate nursing departments; and the centralization in nursing departments of all labor relations authority over the nurses.

Also in *Mercy*, the Board denied separate professional representation to medical laboratory technologists, citing, *inter alia*, the lack of any "compelling" history of distinct representation or collective bargaining, and indicated that, where petitioned for, a unit of all professional employees, excluding registered nurses, would be appropriate in a health care institution.[97] In so doing, we emphasized the unique

[97] Subsequently, in *Dominican Santa Cruz Hospital*, 218 NLRB 1211 (1975), the Board did find appropriate a unit composed of all professional employees other than registered nurses in a health care facility.

community of interest enjoyed by registered nurses apart from all other health care professionals.

Significantly, the Board observed in *Mercy* that,[98]

> [A]lthough there is a diversity of skills between each of these professional groups, *their skills, interests, and working conditions are, in many respects, no more diverse than those of employees in a production and maintenance unit in the industrial sphere or in the overall service and maintenance unit in the health care industry.* Despite these differences, we note that all of the employees here under consideration possess a commonality of professionalism which sets them apart from other employees in the Employer's operations. [Emphasis supplied.]

We thereby recognized that functionally distinct categories of health care professionals do not generally display a community of interest which would entitle them to separate representation even under traditional principles of unit determination.[99]

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[98] 217 NLRB at 769.

[99] For this reason, my colleagues incorrectly refer to *New York University Medical Center,* 217 NLRB 522 (1975), and *Kaiser Foundation Hospitals,* 219 NLRB 325 (1975), where we denied separate units to psychiatrists and pharmacists, respectively, apparently as showing that the Board has "prevented proliferation to the extent Congress wished." In neither case was the requested unit appropriate under our normal community-of-interest criteria—let alone with the congressional directive against unit proliferation in mind. Thus, the Board said in *Kaiser*: "Although the pharmacists obviously share a greater community of interest with each other than they do with the other professional employees, we do not consider that they possess interests evidencing community of interest with each other separate from that shared with the other employees in the health care industry." 219 NLRB at 326.

If the Board had done no more than find appropriate two units of professional employees in health care institutions, registered nurses and all professional employees other than registered nurses, I of course would have no quarrel with this aspect of our unit determinations in the health care field. But the Board soon abandoned the principles laid down in *Mercy* for deciding the appropriateness of professional units in health care facilities.

Thus, over dissents by former Member Walther and myself, the Board granted a separate unit to employed physicians in *Ohio Valley Hospital Association.*[1] Upon careful consideration of the facts, I concluded that the physicians did not exhibit among themselves even a traditionally recognized community of interest, much less the execptionally high degree of community of interest as would be required for separate representation when the congressional warning against health care unit proliferation is taken into account. The majority in *Ohio Valley* seemed to find that, under usual criteria, a distinct community of interest did exist among the physicians. Yet even if that be conceded, the critical point is that the majority substantially, and without explanation, departed from *Mercy* by not requiring that a group of employees requesting separate representation in a health

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[1] 230 NLRB 604 (1977).

care institution possess a significantly greater than usual community of interest. It will be recalled in this connection that the key factor in finding such an exceptional community of interest among registered nurses in *Mercy* was evidence of a compelling history of separate collective bargaining. In *Ohio Valley*, though, there was no indication of a strong tradition of separate representation for employed physicians, or of any other facts which would disclose a much higher than usual community of interest among the employees in the unit sought.

It is evident then that *Ohio Valley* marked the implicit rejection by the Board of the congressional mandate against unit proliferation in the health care industry, at least insofar as professional employees are concerned. The Board thus cleared the way for finding to be appropriate units of health care professionals on traditional bases in flat derogation of the will of Congress.[2]

It is among nonprofessional employees, however, that the Board has given the greatest impetus to the fracturing of the work force in health care institutions. Applying the standard that separate representation is permissible in a health care facility only where the employees in the requested unit display an

[2] See also *Montefiore Hospital and Medical Center*, 235 NLRB No. 29 (1978), in which the Board found appropriate a unit of doctors and dentists at the employer's health center, notwithstanding a close community of interest between those employees and professionals employed at the employer's medical center.

exceptionally high degree of community of interest apart from other employees, I have found only two basic nonprofessional units to be appropriate,[3] business office clerical employees,[4] and all nonprofessionals other than business office clericals;[5] although, in very unusual circumstances, a craft maintenance or boiler room operator unit may also be appropriate.[6] The Board, however, using traditional criteria, has declared in addition that separate units of technical employees,[7] service and maintenance employees,[8] and boiler room operators[9] are appropriate, and it has frequently granted units composed of maintenance

[3] Of course, as noted *supra*, the statute requires that guards be separately represented. In addition, other units, professional or nonprofessional, may be created by stipulation of the parties, *Otis Hspital, Inc.*, 219 NLRB 164 (1975), or as a result of prior bargaining history in the hospital, *St. Joseph Hospital & Medical Center*, 219 NLRB 892 (1975).

[4] *Mercy Hospitals of Sacramento, Inc., supra.*

[5] See, e.g., the dissenting opinion in *Nathen and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*, 217 NLRB 775 (1975), and in *Newington Children's Hospital*, 217 NLRB 793 (1975), as well as my partial dissent in *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 NLRB 787 (1975).

[6] See my concurring opinion in *St. Vincent's Hospital, supra*; *Mercy Center for Health Care Services*, 227 NLRB 1814 (1977).

[7] See the majority opinions in the cases cited in my fn. 5, *supra.*

[8] *Trinity Memorial Hospital of Cudahy, Inc.*, 219 NLRB 215 (1975).

[9] See the majority opinion in *St. Vincent's Hospital, supra.*

employees.[10] After today, there can be no question that units limited to maintenance department employees will be given as a matter of course under customary community-of-interest principles.

Dealing first with business office clerical employees, the Board has long recognized that such employees share an unusually high degree of community of interest, distinct from production (or service) and maintenance employees, and, for that reason, business office clerical employees may not be included in an overall unit in the absence of agreement of the parties.[11] Even more pertinent, where any party objected, the Board had excluded business office clerical employees from service and maintenance units in health care institutions before the passage of the 1974 amendments to the Act.[12] The Board in *Mercy* noted

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[10] *McLean Hospital,* 234 NLRB No. 54 (1978); *Trinity Memorial Hospital of Cudahy, Inc.,* 230 NLRB 855 (1977); *Sinai Hospital of Detroit, Inc.,* 226 NLRB 425 (1976); *West Suburban Hospital,* 224 NLRB 1349 (1976), affd. in the summary judgment proceeding, 227 NLRB 1351 (1977), enforcement denied 570 F.2d 213 (7th Cir. 1978); *St. Francis Hospital—Medical Center,* 223 NLRB 1451 (1976).

[11] *Westinghouse Electric Corporation,* 118 NLRB 1043, 1047 (1957). In contrast, in the industrial sector, although a skilled maintenance unit may be appropriate, *American Cyanamid Company, supra,* so is a comprehensive production (or service) and maintenance unit; likewise, following our decision in *The Sheffield Corporation,* 134 NLRB 1101 (1961), technical employees may be included in such a comprehensive unit or they may form an appropriate unit unto themselves.

[12] See *Extendicare of West Virginia, Inc., d/b/a St. Luke's Hospital, supra; The Swanholm, an Operation of the Martin*

that the unique interests of business office clericals are "rooted in community of interest considerations, including the performance of different functions for different purposes in separate work areas under separate supervision." [13] Thus, in light of the historically understood extreme divergence of interests of business office clerical employees from other employees, I am satisfied that we have properly accorded them separate representation in health care institutions.[14]

However, cavalierly disregarding explicit legislative history dispositive of the question, the Board proceeded to find appropriate separate units of technical employees in the health care industry.[15] As pointed out in section II of this opinion, Congress directly, clearly, and unequivocally endorsed the Board's denial of a unit limited to technical employees in a health care institution in *Extendicare, supra,* where the Board itself had noted that to give such a

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Luther Foundation, Inc., 186 NLRB 45 (1970); *N.L.R.B.* v. *Mar Salle, Inc., d/b/a Mar Salle Convalescent Home,* 425 F.2d 566 (D.C. Cir. 1970), enfg. 173 NLRB 429 (1968).

[13] 217 NLRB 770, fn. 21.

[14] See *Family Doctor Medical Group, a Professional Corporation,* 226 NLRB 118 (1976), where, although the petitioner requested an overall unit of service, maintenance, and business office clerical employees in a health care institution, the Board directed an election in a separate business office clerical unit, as the employer had not agreed to their inclusion in the comprehensive unit.

[15] *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center, supra; Newington Children's Hospital, supra.*

unit would "create unwarranted unit fragmentation" in the industry. The reference to *Extendicare* disclosed that Congress had considered the precise issue of whether technicals should be allowed separate representation, and had decided that they should not. Thus, neither former Member Kennedy nor myself was able to comprehend how the Board managed in *Barnert* and *Newington* to reach a result completely at odds with congressional intent, as well as with its own precedent.[16] In fact, as stated in the *Barnert* and *Newington* dissents, the Board incorrectly applied even traditional principles and concluded in those cases that technical employees in health care institutions are, in effect, *per se* appropriate, even though our policy in the industrial sector has been to decide in each case whether technicals have a sufficiently distinct community of interest to warrant separate representation.[17]

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[16] In *Barnert*, the majority erroneously sought comfort for its technical unit finding by noting that technicals were one of four basic units which Senator Taft's bill, S. 2292, had it become law, would have permitted in health care facilities. (See sec. I, *supra.*) However, as explained in section I, above, congressional inaction upon a bill does not form a proper basis upon which to draw inferences regarding legislative intent. In any case, insertion of the nonproliferation mandate in the legislative history, instead of establishment of certain units as appropriate by statute, merely reflected a different approach to the problem, and inaction upon S. 2292 can hardly be construed to mean that Congress at minimum approved the units specified in the bill.

[17] *The Sheffield Corporation, supra.*

The law regarding the appropriateness of technical employee units in health care institutions, though wrong, has at least been consistent. Board decisions concerning the appropriateness of units composed of maintenance employees in such facilities, however, have gone both ways on similar facts,[18] and, though inconsistent, the case law on this issue can at least be said to have been wrong only about half the time. Regarding requests for separate maintenance department units, I stated in my concurring opinion in *St. Vincent's Hospital* that

> . . . a craft maintenance unit may be appropriate when, viewed in light of all the criteria traditionally considered in determining the appropri-

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[18] Compare the cases cited in my fn. 10, *supra,* granting such units, with *Peter Bent Brigham Hospital, a division of the Affiliated Hospital Centers, Inc.,* 231 NLRB No. 132 (1977); *Northeastern Hospital,* 230 NLRB 1042 (1977); *Sutter Community Hospitals of Sacramento, Inc.,* 227 NLRB 181 (1976); *Anaheim Memorial Hospital Association d/b/a Anaheim Memorial,* 227 NLRB 161 (1976); *Greater Bakersfield Memorial Hospital,* 226 NLRB 971 (1976); *St. Joseph Hospital,* 224 NLRB 270 (1976); *The Baptist Memorial Hospital,* 224 NLRB 199 (1976); *Riverside Methodist Hospital,* 223 NLRB 1084 (1976); and *The Jewish Hospital Association of Cincinnati d/b/a Jewish Hospital of Cincinnati,* 223 NLRB 614 (1976), cases denying separate maintenance employee units. I find the two lines of decisions irreconcilable. So, too, have three courts of appeal. *The Long Island College Hospital* v. *N.L.R.B.,* 566 F.2d 833 (2d. Cir. 1977), denying enforcement to 228 NLRB 83 (1977); *St. Vincent's Hospital* v. *N.L.R.B.,* 567 F.2d 588 (3d Cir. 1977), denying enforcement to *St. Vincent's Hospital, supra; N.L.R.B.* v. *West Suburban Hospital,* 570 F.2d 213 (7th Cir. 1978), denying enforcement to *West Suburban Hospital, supra.*

ateness of maintenance units generally, its establishment does not conflict with the congressional mandate against proliferation of bargaining units in the health care industry. [Footnote omitted.] This standard, which is a more rigid one than is applied in other industries, can be met when the unit sought . . . is composed of licensed craftsmen engaged in traditional craft work, which is performed in a separate and distinct location apart from other employees in the health care facility. Normally, such employees do not perform other services throughout the health care facility . . . and there is, at most, minimal transfer or interchange to and from the craft unit.[19]

To grant separate representation to maintenance or boiler room employees where a less distinct community of interests exists among the employess in the unit sought would be to accord no recognition to the congressional admonition against unit proliferation in this industry.[20] But that is what the members

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[19] 223 NLRB at 639-640. Finding this strict test satisfied, I joined my colleagues in *St. Vincent's* in giving a separate unit to five boiler room operators. Significantly, however, the majority opinion concluded that separate representation for these employees was justified under "traditional standards," and failed even to pay lip service to the congressional directive against fragmentation of units in the health care industry.

In only one case since *St. Vincent's, Mercy Center for Health Care Services, supra,* have I found a group of maintenance employees or boiler room operators to share such an exceptionally high degree of community of interest among themselves as to justify separate representation.

[20] Although I concurred separately in *Jewish Hospital of Cincinnati, supra,* I agree with the following observation of

of the majority evidently have in mind. What is truly remarkable, though, is the "rationale" used to support this conclusion. My colleagues start with the reasonable premise, with which I do not disagree, that Congress did not intend to *preclude* the Board from finding maintenance units appropriate. From that, however, they jump to the entirely unwarranted conclusion that the appropriateness of such units should be judged *only* in terms of traditional community-of-interest criteria, notwithstanding the special concern displayed by Congress about unit proliferation in the health care field. In so finding, the majority has either rewritten, or just ignored, the relevant legislative history of the health care amendments, and has overruled, *sub silentio,* each of the Board cases cited in my footnote 18, *supra,* in which we found maintenance units not to be appropriate in light of the congressional nonproliferation admonition.

The majority points out that the Board denied a separate unit to switchboard operators, apart from

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the majority in that case in reference to separate representation for maintenance (or engineering) department employees:

> [H]ospitals are composed of a number of departments each of which, in a general sense, could be said to be made up of skilled employees performing duties which are functionally distinct. The real question is whether the distinctions between engineering department employees and the employees in other departments show such separate interests as to warrant granting engineering department employees a separate unit while not permitting skilled employees in other departments the same privilege. [223 NLRB at 617.]

other business office clerical employees in a hospital, in *Duke University*; [21] that it refused to give a separate unit composed of all laboratory and x-ray department in *American Hospital Management Corp. d/b/a Mad River Community Hospital*; [22] and that it declined to accord separate representation to laboratory technical employees in *Pontiac Osteopathic Hospital.*[23] However, as I stated concerning the Board's denial of separate professional representation to psychiatrists and pharmacists, footnote 99, *supra*, such cases do not establish that the Board has inhibited unit proliferation in this field as Congress intended, because the units sought were inappropriate under traditional criteria.

V.

In three major cases, two arising within the jurisdiction of the Third Circuit,[24] and one within that of the Seventh Circuit,[25] courts of appeal have declared in no uncertain terms that the Board must take heed of the congressional admonition against unit proliferation when deciding upon appropriate units in health care institutions.

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[21] 217 NLRB 799 (1975).

[22] 219 NLRB 25 (1975).

[23] 227 NLRB 1706 (1977).

[24] *Memorial Hospital of Roxborough* v. *N.L.R.B.*, 545 F.2d 351, 360, 361 (1976), denying enforcement to 217 NLRB 520 (1975) (myself dissenting); *St. Vincent's Hospital* v. *N.L.R.B.*, *supra.*

[25] *N.L.R.B.* v. *West Suburban Hospital, supra.*

In *Roxborough*, the court denied enforcement to a Board Order requiring the employer to bargain with the union as the representative of the employees in its maintenance department. In the course of its opinion, the court noted that, "[T]he legislative history of these [hospital] amendments does indicate the special concern of Congress with respect to appropriate units in this industry," and that Congress "interjected a special consideration into the Board's determination of appropriate units in the health care industry." The court held that the Board's Order, based as it was upon an extension of comity to a state labor board's unit determination, was not entitled to enforcement, because the Board had not exercised *its own* discretion under Section 9(b) of the Act to find units appropriate nor had it "complied with the Congressional admonition that it consider proliferation of units in the health care industry."

The same circuit court also denied enforcement to the Board's bargaining order in *St. Vincent's*, in which case, as noted in section IV, *supra*, the Board found appropriate a unit confined to five boiler room operators.[26] Contrary to my colleagues, the court, in

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[26] Although, as explained above in my fn. 19 and accompanying text, I did so because, in my estimation, the facts disclosed an exceptionally strong community of interest among the employees in the unit sought—sufficient to justify allowing them separate representation without running afoul of the congressional nonproliferation directive. But, as also noted in fn. 19, the majority purported to grant the unit solely upon traditional community-of-interest principles, without even a fleeting reference to the intent of Congress that separate bargaining units be given sparingly in this industry. Thus, the

so doing, did not misinterpret the legislative history of the 1974 amendments to the Act, and it certainly did not find that the Board was "precluded . . . from relying upon its traditional community-of-interest criteria in making unit determinations in the health care industry." Rather, the court simply informed the Board that it may not depend solely upon its customary community-of-interest test in making such determinations, but must give weight as well to the intent of Congress that units in health care facilities not be allowed to multiply:

> [T]he factors of amount of contact between workers, separate immediate supervision, and the special skills of certain crafts must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with congressional intent to treat this unique field in a special manner.[27]

In this connection, the court rightly observed:

> The legislative history of the health care amendments, however, makes it quite clear that Congress directed the Board to apply a standard in this field that was not traditional. Prolifera-

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difference between myself and the court in *St. Vincent's* amounted to no more than a factual disagreement. I fully concur with the court's exposition of the law regarding health care unit determinations.

[27] 567 F.2d at 592.

> tion of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension. The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blueprint Congress desired in a hospital.[28]

The Seventh Circuit made the same point in *West Suburban*, where it set aside a Board Order based on a finding that a unit limited to maintenance employees in the hospital was appropriate. The Board majority opinion in *West Suburban*, as the court correctly noted, did no more than make "mere lip-service mention" of the congressional admonition against unit proliferation in health care institutions, and proceeded to judge the facts strictly in terms of its usual community-of-interest test. Thus, "without any indication from the Board as to the manner in which its unit determination in [the] case implemented or reflected that admonition," the court held that the Board's decision violated the congressional nonproliferation mandate.

VI.

As indicated, I dissented in the original proceeding involving this Employer, and declined to extend comity to the PLRB certification of the Charging Party as collective-bargaining representative of certain of the Employer's maintenance employees. As will be seen, the facts in the instant case fell far

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[28] *Ibid.*

short of establishing that the employees in the unit sought process such an exceptionally high degree of community of interest among themselves, as to permit them separate representation under the criteria set forth in my concurring opinion in *St. Vincent's Hospital, supra*. Not only that, the requested unit is inappropriate in light of the numerous Board cases cited in my footnote 18, *supra*, where we have denied separate maintenance units in similar circumstances.

In the first place, the maintenance employees whom the Charging Party would represent run the gamut from skilled to unskilled. The proposed unit consists of 3 carpenters; 1 leadman electrician and 6 electricans in 2 skill classifications; 1 leadman elevator employee and 2 elevator mechanics; 1 leadman painter and 6 painters in 2 skill classifications; 1 leadman plumber and 1 plumber in each of 2 skilled classifications; 2 plasterers; 1 leadman mechanic and 13 mechanics in 2 skill classifications; 1 leadman refrigeration mechanic and 2 refrigeration mechanics; 4 operating engineers; 4 firemen; 4 laborers; 1 compactor operator; 1 machinist; 2 wall washers; 1 sheet metal worker; and 1 storeroom attendant. This unit would not even encompass all maintenance department employees: it excludes the chauffeur, two custodians, two draftsmen, one secretary, and three clerks in two classifications. Of the 61 employees whom the Charging Party is willing to represent, only the plumber is registered and only the operating engineers are licensed. The firemen are trying to become licensed, but are not yet. While some employees

may possess craft-like skills, there is no indication whether any have even achieved journeymen level status) others have barely any skill. Thus, according to the PLRB decision, mechanics, for example, "are graded according to the degree of their skill, ranging from those who operate and repair complex machinery, to 'handyman' who may repair a light switch." Further, as the PLRB found, unskilled laborers often work with higher skilled employees.

Most maintenance employees work throughout the various areas of the hospital, often work in conjunction with housekeeping employees, and come into regular contact with other nonprofessional employees. Although maintenance employees, in general, receive somewhat higher pay than service employees, both groups of employees receive the same fringe benefits, use the same entrance and timeclock, are housed in the same part of the hospital, have the same relaxation facilities and opportunities, and are entitled to receive the same continuing education and tuition assistance benefits.

With these facts in mind, I see no justification for permitting a segment of the Employer's maintenance employees separate representation.[29]

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[29] See, in particular, *The Jewish Hospital Association of Cincinnati d/b/a Jewish Hospital of Cincinnati, supra*, where the Board found inappropriate a unit composed of maintenance employees, notwithstanding the fact that 90 percent of those in the unit sought were journeyman level craftsmen.

VII.

In closing, I make four observations by way of summary.

1. If Congress had intended, as my colleagues assert, that the Board apply only its usual community-of-interest criteria in deciding upon appropriate units in the health care industry, there would have been no need for Congress to have said anything in the legislative history about unit determinations in this field. Yet, Congress did display special concern in the committee reports that units not be allowed to proliferate in health care institutions, because it believed that strikes and work stoppages disruptive of patient care would be more frequent, the greater the number of bargaining units.

2. The members of the majority, however, contend that Congress was only afraid that the Board would establish units for each job classification or craft in a hospital, even though it had not done so in the industrial sphere. But it is not logical that Congress would be apprehensive that the Board would suddenly start finding to be appropriate units in health care institutions which it had generally not granted in industrial facilities.

3. The only reasonable reading of the legislative history, as the courts have recognized, is that Congress intended that the Board consider the "factor of public interest" in unit limitation, along with its traditional criteria, in making unit determinatons in the health care industry. Translating this command into a workable test, separate units should be

found appropriate in this field only where the employees in the proposed unit enjoy an exceptionally high degree of community of interest among themselves, distinct and apart from other employees.

4. As the review of the cases in this opinion reveals, application of the foregoing standard results in the creation of no more than two professional health care units, (1) registered nurses, and (2) all other professionals; and two basic nonprofessional units, (1) business office clerical employees, and (2) all other nonprofessionals, except, in very rare corcumstances, where a boiler room operator or craft maintenance unit may be appropriate. In contrast, use only of traditional community-of-interest principles results in finding appropriate three professional units, (1) registered nurses, (2) employed physicians, and (3) all other professionals; and five nonprofessional units, (1) boiler room operators, (2) maintenance employees, (3) service employees (where a maintenance unit has been approved), (4) technical employees, and (5) business office clerical employees. As time goes on, I suspect the Board will find even more units, particularly on the professional level, appropriate under "traditional" principles.

As has been seen, rather than specifying a limited number and type of units as appropriate by statute in health care institutions, Congress entrusted to the Board the responsibility of giving effect to its wish that the number of units in such institutions be restricted. That is why the most disturbing aspect of today's decision is that the Board has disregarded

Congress' desires, indeed shown itself to be completely indifferent to them, and that is why I have felt constrained to dissent at length.

Dated, Washington, D.C. December 19, 1978

John A. Penello, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LABOR RELATIONS BOARD

Case No. PERA-R-1038-W

IN THE MATTER OF THE EMPLOYEES OF
ALLEGHENY GENERAL HOSPITAL

ORDER AND NOTICE OF ELECTION

A Petition for Representation by Public Employes, Group of Public Employes or Employe Organization was filed with the Pennsylvania Labor Relations Board, hereinafter called the "Board", on April 6, 1971, by International Union of Operating Engineers, Local 95-95A, AFL-CIO, hereinafter called the "Union", alleging, inter alia, that 30% or more of the employes of Allegheny General Hospital, hereinafter called "Employer", in an appropriate unit, desire to be exclusively represented for the purpose of collective bargaining, and requesting an Order for an election.

Pursuant to due notice to all interested parties, a hearing was held on October 15, 1971, in Pittsburgh, Pennsylvania, before Martin A. Hamburger, Esquire, a duly designated Trial Examiner of the Board, which hearing was continued and completed on October 20, 1971. All parties in interest were present and were afforded an opportunity to examine and cross-examine witnesses and to present testimony and introduce evidence.

The Board, on the basis of testimony and evidence presented at the hearings and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the parties stipulated and agreed that Allegheny General Hospital is a health institution, with its principal office at 320 East North Avenue, Pittsburgh, Pennsylvania, and the parties stipulated that it is a "public employer within the meaning of Section 301(1) of the Public Employe Relations Act". (N.T. 7)

2. That the parties stipulated and agreed that International Union of Operating Engineers, Local 95-95A, AFL-CIO, is an employe oragnization which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, employer-employe disputes, wages, rates of pay, hours of employment and other conditions of work, with its principal office at the Lawyers Building, Pittsburgh, Pennsylvania, and the parties stipulated that it is an "employe organization within the meaning of Section 301(3) of the Public Employe Relations Act". (N.T. 7)

3. That the unit proposed by the Union, as stipulated during the hearing, and somewhat amending the original Petition, consists of sixty-one (61) of the employes in the Maintenance Department of the employer in the following classifications and strengths: Carpenter 3, Leadman Electrician 1, Electrician A 3,

Electrician B 3, Leadman Elevators 1, Elevator Mechanic 2, Leadman Painter 1, Painter A 3, Painter B 3, Leadman Plumber 1, Plumber A 1, Plumber B 1, Plasterer (tile setter) 2, Leadman Mechanic 1, Mechanic A 1, Mechanic C 12, Leadman Refrigeration 1, Refrigeration Mechanic 2, Operating Engineers 4, Fireman 4, Laborers 4, Compactor Operator 1, Machinist 1, Wall Washers 2, Sheetmetal Worker 1, and Storeroom Attendant 1. (N.T. 8-12)

4. That the unit proposed by the employer consists of one hundred and sixty-two (162) employes; seventy (70) employes in employer's Maintenance Department and ninety-two (92) employes in employer's Housekeeping Department; it includes, in addition to the classifications proposed by the Union, the following classifications and strengths: *Maintenance Department*—Chauffeur 1, Custodian B 2, Draftsman 2, Secretary A 1, Clerk A 1, Clerk B 2; *Housekeeping Department*—Custodian A 10, Custodian B 79, Seamstress 1 (presently vacant), Clerk A 1, and Clerk B 1. (N.T. 8-12)

5. That the employer has approximately 1,250 full-time employes and a total work force of between 1,950 and 2,000; the Maintenance and Housekeeping Departments are both within the employer's "Supporting Services" area or division as defined by employer's administrative structure; additionally the Laundry, Dietary, Security and Swithboard Departments are within the "Supporting Services" area; there is a Director of the Maintenance Department, two (2) supervisors and a man responsible for plan-

ning, all of whom direct and supervise the Maintenance Department employes; the administrative structure in the Housekeeping Department consists of Executive Housekeeper, Assistant Housekeeper, and five (5) supervisors, who give work assignments to Housekeeping personnel. (N.T. 16, 17, 65, 66, 73 and 74).

6. That persons employed as Carpenter, Electrician, Painter, Plumber, Plasterer, Sheetmetal Worker, Elevator Mechanic, Machinist, Operating Engineer, Fireman and Mechanic perform functions normally associated with their craft or skill; Mechanics are graded according to the degree of their skill, ranging from those who operate and repair complex machinery, to "handymen" who may repair a light switch; Laborers work with craftsmen as required, perform outside maintenance work, and are not merely helpers; the Compactor Operator operates equipment which compacts loose trash; Wall Washers use wall washing equipment to wash walls, at times in preparation for painting, do high dusting, change bulbs and less complex light fixtures; the Storeroom Attendant maintains the storeroom and inventories, keeps and distributes tools and parts to Maintenance employes. (N.T. 20-27, 53, 54, 59, 60 and 61).

7. That Draftsmen produce working drawings which form the basis for maintenance work and record the location of internal systems; have specialized post-high school training; work predominantly in the Maintenance Department Office between the hours of 8:30 a.m. and 5:00 p.m., earn $3.32 an hour, wear

white-collar dress, and receive their instructions largely from the Director of the Maintenance Department. (N.T. 28, 29, 63-65 and 67).

8. That the Chauffeur operates the employer's station wagon, transports hospital personnel and persons having business with the hospital and delivers small items; is responsible for servicing the vehicle, but not its maintenance or repairs; receives work instructions from any hospital personnel having sufficient authority; has an operators license, but is not a mechanic; and earns $3.01 an hour. (N.T. 26, 36, 55-58)

9. That the Secretary and the Clerks A and B in the Maintenance Department and the Clerks in the Housekeeping Department perform secretarial and clerical tasks, keep and check records, receive and issue work, purchase, and other orders and requisitions pertaining to the operation of their respective departments; the Secretary maintains the hospital key control; they wear street dress and not uniforms, work between 8:30 a.m. and 5:00 p.m. in their Department's Offices; the Secretary earns $3.08 an hour, the Clerks from $2.35 to $2.85 an hour. (N.T. 29-31, 35-37, 66-71, 73 and 74).

10. That Custodian B employes in the Maintenance Department clean Maintenance Department facilities and are, therefore, attached to the Maintenance Department; have the same job description, pre-hire experience and educational requirements, and receive the same rate of pay of $2.64 an hour, as the Custodian B employes in the Housekeeping Depart-

ment; Custodian A and B in the Housekeeping Department do normal cleaning, sweep and dust mop floors, clean furniture, fixtures and interior glass, change beds and linen and handle cubical curtains; Custodians A additionally operate power equipment related to floor care, such as buffing. Custodians A earn $2.81 an hour. (N.T. 28, 33, 36, 44, 45 and 72).

11. That the Maintenance employes' hourly rate of pay ranges from $4.47, earned by Leadman Elevator Mechanic, to $2.64 earned by the Wall Washer and Compactor Operator; the next lowest rate of $3.01 is earned by Laborer and Painter B; all but four (4) employes employed as Wall Washer and Compactor Operator earn in excess of the top hourly rate of $2.81 earned by Housekeeping Department Custodians. (N.T. 35-37)

12. That the Maintenance employes' working hours, lunch time, and breaks differ somewhat from those of the Housekeeping Department Custodians; the Maintenance and Housekeeping Departments each determine the respective lunch time and break time of employes within their Departments; Maintenance employes' first shift is 7:30 p.m. to 4:00 p.m., lunch time is generally 12:00 to 12:30, the morning break between 10:00 and 10:15 a.m., the afternoon break between 2:30 and 2:45 p.m.; some of these employes work the second and third (night) shifts; Housekeeping Department Custodians' first shift is 7:00 a.m. to 4:10 p.m.; lunch time is 10:45 to 11:15 a.m. for some and staggered for others; the morning break from 9:00 a.m. to 9:15 for some and morning and

afternoon breaks staggered for others; and about 10 to 12 of the Housekeeping Custodians commence work later to provide coverage into the early evening, but none work during the night shift. (N.T. 47-48, 87-89, 172-173).

13. That the Maintenance employes wear green uniforms, female Housekeeping Custodians wear blue uniforms, male Housekeeping Custodians wear gray pants and white shirts; Maintenance employes have separate locker facilities, Housekeeping Custodians use the main locker facilities; Mechanics and certain other Maintenance employes provide their own hand tools, Housekeeping Custodian employes do not provide their own tools; the employer provides all other tools and equipment to both groups of employes; Maintenance employes are more likely to utilize the shower facilities and there are separate maintenance shops; both Maintenance and Housekeeping employes work on the employer's total facility, but Housekeeping employes are frequently assigned regular specific areas and Maintenance employes are assigned by function to be performed; Compactor Operator, Laborer, and Custodian have no pre-hire educational and experience requirements; craftsmen are expected to be able to perform their craft when hired; at least one (1) Plumber is registered, the Engineer is licensed and the Firemen are attempting to become licensed; Housekeeping and Maintenance report in at different places for work; and grievance procedure follows supervisory lines and is different at the first and second levels which are within the Maintenance

and Housekeeping Departments, respectively, but the same at the third, fourth and fifth levels. (N.T. 44, 45, 47, 54, 60-63, 84-86, 89-91, 108-109)

14. That the employer provides the same continuing education and tuition assistance for both groups; their vendor exposure is similar and often identical; they have the same relaxation provisions and facilities and employe fringe benefits; they use the same entrance and timeclock also used by other employes; both are housed in the same part of the hospital. (N.T. 45-49 and 80)

15. That the Maintenance employes and Housekeeping Custodians perform some tasks cooperatively and simultaneously and some others in tandem, for example in isolation procedures and the "turnaround" of a patient's room in preparation for new patient occupancy; Maintenance employes may flush traps and drains or change air condition filters while Custodians clean the room, or in the operating room procedure Housekeeping employes will clean and Maintenance employes will subsequently measure bacteriological count with a megometer; close scheduling and coordination is required; both groups contribute in accordance with their respective skills and functions to achieving a clean and safe environment; Housekeeping employes are especially directed to notice and report mechanical defects in equipment; increasing sophistication of equipment and setting for delivery of patient care requires continuing and increasingly coordinated maintenance and cleaning. (N.T. 37-43, 100-101)

16. That females constitute 75% of Housekeeping Department employes and 4% to 5% of Maintenance Department employes; minority employes constitute 25% in the Housekeeping Department and 3% in the Maintenance Department. (N.T. 122)

17. That from 1936 to the present, eight (8) employes from the Housekeeping Department moved to positions in the Maintenance Department; two (2) of these separated from the employer in 1965 and 1969; three (3) of the remaining six (6) are in the lowest Maintenance pay category, equivalent to the lowest Housekeeping Department pay category; the remaining three (3) are Engineer, Elevator Mechanic and Painter A and entered the Maintenance Department in 1939, 1964 and 1956, respectively, and required necessary skills and training outside of their employment for the Hospital. (Stipulation of Fact attached to Employer's Brief and N.T. 84, 121, 122, 125-131)

18. That craft leadmen direct the work of their craft, 85% of their time is devoted to working the remainder to leading; they are not considered supervisory by the employer and do not hire, fire or discipline other employes. (N.T. 20, 32-33)

DISCUSSION

The Union here is seeking to represent a unit consisting of 61 of 70 employes in the employer's Maintenance Department. The employer contends this unit to be inappropriate and urges the Board

to determine as an appropriate unit a larger one consisting of all 162 employes in its Maintenance and Housekeeping Department.

Is the unit proposed by Petitioner an appropriate unit? Section 604 of the Public Employee Relations Act provides:

> ". . . In determining the appropriateness of the unit, the Board shall:
>
> (1) take into consideration but shall not be limited to the following: (i) public employes must have an identifiable community of interest, and (ii) the effects of over-fragmentization."

Petitioner's proposed unit embraces all employes in the Maintenance Department, excluding only employs in the classifications Chauffeur, Custodian B, Draftsman, Secretary and Clerk. Those within the unit clearly have an identifiable community of interest. They are within the same department, perform maintenance work, wear the same uniforms, have their own locker and shower facilities and work the same hours and shifts. They range in skills from craftsmen and licensed engineers, who perform work normally associated with their craft or trade and who are expected to possess those skills when hired, to those less skilled, such as Mechanic C, who is likened to a handyman and may repair a light switch, Laborer who is not merely a helper and who does outside maintenance work and works with craftsmen as required, Compactor Operator who operates a trash compressor and Wall Washer who does high work and dusting. Their hourly rate of pay ranges from $4.47 to $2.64. The Board has in the past recognized separate maintenance units as appropriate, *Hahnemann, supra*, and *Magee-Women's Hospital*, No. PERA-R-175-W.

Is the line of demarcation of Petitioner's unit which embraces the less-skilled Maintenance Department employes and excludes the remaining Maintenance employes and Housekeeping Department employes, inappropriate as the employer contends? And considering all factors, including an identifiable community of interest and the effects of over-fragmentization, is a unit consisting of all Maintenance and Housekeeping employes the appropriate unit, and Petitioner's unit therefore inappropriate?

The Secretary and Clerks in Maintenance and the Clerks in Housekeeping, while their work is unquestionably necessary to the proper functioning of their respective Departments, are essentially white-collar clerical workers. They work in the Department offices, in normal street dress, and their working hours are different from the uniformed personnel in their Departments. They would fall logically into a unit for office and clerical personnel. The Draftsmen, too, are white-collar, work predominantly in the office and have different working hours than uniform employes. They utilize their skills in desk work, different in nature from physical maintenance work. These factors place them into a technical category outside Maintenance, notwithstanding the functional relationship of their work to the Maintenance Department. The Chauffeur's work appears to have no special connection to the remaining work of the Maintenance

Department. The Chauffeur is unskilled except for his ability to operate the employer's vehicle and his supervision is to a large extent from outside the Department. He does not, therefore, fall logically within a unit for Maintenance employes. The Custodian B in the Maintenance Department is within that Department because his custodial work is directed toward Maintenance Department facilities. His compensation and job description are identical with the Housekeeping Department Custodian B classification. As such, his interests coincide with the Custodians in the Housekeeping Department.

COMPARISON OF REMAINING MAINTENANCE EMPLOYES AND HOUSEKEEPING DEPARTMENT CUSTODIANS

While we are not prepared to accept the skill groupings in Employer's Brief as sufficiently supported by testimony, if degree of skill were the only factor to be considered it would be difficult to differentiate, for instance, between Custodian A, who operates floor polishing equipment, and Mechanic C, who repairs light switches. Even so, it appears that most, if not all, of the employes in Petitioner's unit possess and use at least some skill, whereas the large bulk of Housekeeping employes (79 of 91) are in the Custodian B classification who do unskilled work. Viewed in terms of other relevant factors, however, a sound basis for differentiation emerges. Maintenance workers operate plant, systems, and equipment and keep them in good working order and repair them when necessary. Custodians fundamentally do cleaning

work. This distinction is observed in the *Hahnemann* decision [1] in which maids are placed in the Service employes' unit and not in the Maintenance unit. They wear different uniforms, work somewhat different hours and shifts and observe different lunch times and breaks, have different locker facilities, some of the Maintenance employes provide their own tools while Custodians do not, they fall under different supervision, Maintenance work sites are determined by function, while Custodians often have regularly assigned work sites, their grievance procedures differ at the first and second levels within their respective Departments, although it is the same at the third, fourth and fifth levels. Their compensation differs appreciably, all but four of the Maintenance employes receive considerably higher hourly rates of pay than the Custodians. Finally, the employer has himself established and placed these employes in separate departments. This is especially to be noted as regards Wall Washers, in whose case the other criteria are less compelling.

There are similarities as well. Both groups receive the same fringe benefits, continuing education and tuition assistance; their vendor exposure is similar and often identical; they have the same relaxation provisions and facilities, use the same entrance and timeclock also used by other employes and are housed in the same part of the hospital.

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[1] In the Matter of The Employes of Hahnemann Medical College and Hospital of Philadelphia, No. PERA-R-28-E (1971).

The employer cites additional factors in support of his contention that Maintenance and Housekeeping are united in their community of interest and the effects of fragmentation. Broadly categorized they are (1) functional interaction, and (2) equal employment opportunity. The first embraces preventive maintenance and the environmental aspect. It is asserted that Housekeeping employes are especially directed to be alert to and report maintenance malfunction. Further, both Maintenance and Housekeeping share in the common objective of a so-called "control environment"—which appears to mean essentially one that is clean and safe in terms of properly functioning plant, machinery and equipment, appropriate to the delivery of medical care and in conformity with medical standards. Then, too, many tasks are performed jointly, or in tandem, for example, the "turnaround" of a room in preparation of new patient occupancy requiring flushing of traps and drains, changing filters in air conditioners and washing of walls by Maintenance and general cleaning by Housekeeping. This entails scheduling and coordination of the time the work is actually performed. It also means vendor exposure, often common to both Maintenance and Housekeeping to familiarize employes with equipment for maintenance, operating and cleaning purposes. Increasing sophistication in the setting of patient care and equipment used increases the need for Coordination. Separate bargaining units would reduce effectiveness it is claimed.

We find these factors to be less than persuasive. The chief differentiation between cleaning and maintenance work remains. The performance of different tasks, requiring different and varying degrees of skill, even when done simultaneously, or as part of a common objective, does not create a community of interest. Noticing and reporting defects requires no special skill, may be done as well by other hospital personnel or even patients and visitors, and does not raise Housekeeping to the Maintenance level. Nor is it clearly demonstrated that increasing sophistication in equipment requires cleaning skills of a higher order. No reasons are given to explain why loss of effectiveness would result.

The Maintenance Department is predominantly male and the Houskeeping Department is 75% female. The employer contends that learning opportunities arise and motivation to aspire to higher grade Maintenance positions is stimulated as a result of the close working association between Housekeeping and Maintenance employees; that there has existed actual job progression from Housekeeping to Maintenance and there is further potential for such progression which is not equally present with respect to Laundry, Dietary and other Departments within the Supporting Services division; Housekeeping is entry level for female and minority employes and upgrading possibilities are an essential element of Equal Opportunity and required to achieve a fair representation of these groups in higher skill classifications; and separate units would discourage mi-

nority and female motivation to seek higher grade jobs in Maintenance, and separate seniority in Maintenance would nearly quash it altogether. The employer further urges the Board to make Equal Opportunity a dimension in defining community of interest and in determining the appropriate unit.

The history of transfers from Housekeeping to Maintenance since 1936 does not indicate an existing pattern of movement toward higher grade positions in Maintenance. Nevertheless, a potential for such progression appears to exist and the expert testimony to the effect that a separate unit may well discourage minority and female aspirations and separate seniority is likely to destroy them, is persuasive and requires our consideration. It is not suggested that the collective bargaining process as such, but certain practices and patterns that have developed within its framework, are inimical to those aspirations and actual job progression.

It is in the interest of one group of employes to refrain from action which abridges the rights and opportunities of another group of employes and which interferes with the promotion of "orderly and constructive relationships" between the employer and his employes. The Board must likewise consider this dimension in assessing community of interest and in determining the appropriate unit. While not expressly enumerated in the Act, it is inherent in its stated policy, which is to be implemented consistent with other applicable law.

Clearly, the strongest negative impact is seen to accrue from a separate seniority provision. So, too, the cases and material cited by the employer are directed towards seniority provisions and other vehicles of discrimination which, like union control of employment eligibility are not present here. The Board cannot consider these practices simply because they may arise in the future. Nothing prevents the employer from resisting or those aggrieved from combatting their future occurrence by using the remedial procedures available to them. There remains the less severe and less certain discouragement to aspiration occasioned by the creation of the proposed brick and mortar in the wall separating victims of discrimination and only reluctantly accept this possible consequence. At the same time, this element is only one in an already existing context of administrative and other separation rooted in historic attitudes and patterns. It alone is not insurmountable, particularly if this aggrieved assert their rights and the employer, consistent wtih his stated concern, aids in this process. This element must also be weighed together with all the other factors hereinabove discussed, which taken together, justify finding the proposed unit appropriate.

CONCLUSIONS

The Board, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That the Allegheny General Hospital is a "public employer" within the meaning of Section 301(1) of the Public Employe Relations Act.

2. That International Union of Operating Engineers, Local 95-95A, AFL-CIO is an "employe organization" within the meaning of Section 301(3) of the Public Employe Relations Act.

3. That the Pennsylvania Labor Relations Board has jurisdiction over the parties hereto.

4. That craft leadmen are not supervisors or first level supervisors under Section 301(6) and (19) of the Public Employe Relations Act.

5. That the unit deemed appropriate for the purpose of collective bargaining between the employer and its employes is a subdivision of the employer unit (described as the Maintenance unit), comprised of the following classifications: Carpenter, Leadman Electrician, Electrician A, Electrician B, Leadman Elevators, Elevator Mechanic, Leadman Painter, Painter A, Painter B, Leadman Plumber, Plumber A, Plumber B, Plasterer (tile setter), Leadman Mechanic, Mechanic A, Mechanic C, Leadman Refrigeration, Refrigeration Mechanic, Operating Engineers, Fireman, Laborers, Compactor Operator, Machinist, Wall Washer, Sheetmetal Worker, and Storeroom Attendant and excluding management level employes,

supervisors, first level supervisors, confidential employes and guards as defined in the Act.

NOW, THEREFORE NOTICE is hereby given that an ELECTION, by secret ballot, will be conducted on

THURSDAY, JUNE 15, 1972

between the hours of 1:00 o'clock P.M., to 4:00 o'clock P.M., in Room B-21, Nurses Quarters, Allegheny General Hospital, 320 North Avenue, Pittsburgh, Pennsylvania, in a subdivision of the employer unit (described as the Maintenance unit), comprised of the following classifications: Carpenter, Leadmen Electrician, Electrician A, Electrician B, Leadman Elevators, Elevator Mechanic, Leadman Painter, Painter A, Painter B, Leadman Plumber, Plumber A, Plumber B, Plasterer (tile setter), Leadman Mechanic, Mechanic A, Mechanic C, Leadman Refrigeration, Regrigeration Mechanic, Operating Engineers, Fireman, Laborers, Compactor Operator, Machinist, Wall Washer, Sheetmetal Worker and Storeroom Attendant, and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act.

An eligibility list of those entitled to vote is attached hereto together with a sample form of the ballot to be issued at the time of Election. Pursuant to Rule 13.3 parties in interest should each nominate one (1) Watcher who shall be given authority to act as same immediately prior to the opening of the Election.

THIS ORDER AND NOTICE OF ELECTION and the attached material shall be posted by the Employer immediately upon receipt, subject to the provisions of ARTICLE VI of the Board's Rules and Regulations approved October 9, 1970, as amended, and, subsequent to posting, the Public Employer shall furnish to the Pennsylvania Labor Relations Board an Affidavit of Posting in compliance with this Order.

SIGNED, SEALED AND DATED at Harrisburg, Pennsylvania this twenty-third of May, 1972.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Raymond L. Scheib
RAYMOND L. SCHEIB, Chairman

/s/ Joseph J. Licastro
JOSEPH J. LICASTRO, Member

/s/ James H. Jones
JAMES H. JONES, Member

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IN THE

Supreme Court of the United States

October Term, 1979

79-1197

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MERCY HOSPITAL ASSOCIATION

BRIEF IN OPPOSITION TO THE NATIONAL LABOR RELATIONS BOARD'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395; 29 U.S.C. Sec. 151, *et seq).*

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Section 8(a)(5) 3

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IN THE SUPREME COURT OF THE UNITED STATES

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MERCY HOSPITAL ASSOCIATION

BRIEF IN OPPOSITION TO THE NATIONAL LABOR RELATIONS BOARD'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted on behalf of Mercy Hospital Association ("the Hospital") in opposition to the petition for a writ of certiorari filed with the Court by the Solicitor General of the United States on behalf of the National Labor Relations Board ("the Board"). (16a-28a)

OPINIONS BELOW

The opinion of the Court of Appeals (1a-13a) is reported at 606 F.2d 22 (2nd Cir. 1979). The Board's Decision and Order are reported at 238 N.L.R.B. No. 145 (1978). (16a-28a)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATEMENT OF THE ISSUE PRESENTED

Whether the Court should grant the Board's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit denying enforcement of the Board's order that the Hospital bargain with a union as the collective bargaining representative of the Hospital's maintenance and engineering department employees.

STATEMENT OF THE CASE

This case is before the Court upon the Board's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered September 4, 1979.

A. The Representation Proceeding

On September 26, 1977, the International Union of Operating Engineers, Local 30-30A, AFL-CIO (the "Union") filed with Region 29 of the Board a petition for certification as the exclusive bargaining representative of the Hospital's full-time and regular part-time maintenance and engineering employees. (A. 12)[1] The Hospital's position was that the unit sought by the Union was inappropriate for the purpose of collective bargaining in light of officially reported Board precedent holding that maintenance and engineering employees should be included in a broad service and maintenance unit. The Hospital also brought to the Board's attention that its maintenance and engineering employees had voted two years earlier in a Board election in a broad service and maintenance unit.

Hearings on the issue of the appropriateness of the unit were conducted, and on November 11, 1977, the Board's Regional Director issued a Decision and Direction of Election, finding that a separate unit of maintenance and engineering employees was appropriate for collective bargaining. (29a)

On December 1, 1977, the Hospital filed with the Board a Request for Review of the Regional Director's Decision and Direction of Election, contending that a substantial question of law and policy was raised by the Regional Director's departure from officially reported Board precedent. The Hospital argued that the Decision contravened the Congressional admonition against the undue proliferation of bargaining units in the health care industry and that the unit was inappropriate since employees in the Hospital's engineering and maintenance department did not have a separate and identifiable community of interest which would justify placing them in a unit separate and apart from the Hospital's other service and maintenance employees.

[1] The designation "A." refers to the Appendix in the Court below.

The Board denied the Hospital's Request for Review, and on December 8, 1977, an election was conducted in which a majority of the employees in the unit selected the Union as their collective bargaining representative. On December 20, 1977, the Regional Director issued a Certification of Representative. (A.103)

B. The Unfair Labor Practice Proceeding

By letter dated February 2, 1978, the Union requested the Hospital to commence negotiations. On February 24, 1978, the Hospital advised the Union that it would not enter into the requested negotiations unless and until the question of the appropriateness of the unit was reviewed by the United States Court of Appeals for the Second Circuit. (A.2)

The Union thereafter filed an unfair labor practice charge with the Board, alleging a violation of Sections 8(a)(1) and 8(a)(5) of the Act.

On August 9, 1978, the Board's General Counsel moved for summary judgment on the ground that the Hospital was not entitled to relitigate the issues previously litigated in the representation proceeding. (A.2)

On September 29, 1978, the Board issued its Decision and Order (16a), granting the Motion for Summary Judgment and concluding that the Hospital had engaged in unfair labor practices within the meaning of Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit found appropriate by the Board. The Board's Order required the Hospital to bargain with the Union in a unit described as follows:

> All full-time and regular part-time maintenance and engineering employees, including maintenance workers, maintenance mechanics, electricians, gardeners, groundsmen, carpenters, painter/plasterers, plumbers, boilermen, watch engineers and chauffeurs employed by the Employer at its Rockville Centre, New York location, excluding all other employees, guards, and all supervisors as defined in the Act. (23a)

C. The Enforcement Proceeding

After the Hospital refused to comply with the Board's Order, the Board filed with the United States Court of Appeals for the Second Circuit a Petition for Enforcement of its Order. On September 4, 1979, the Second Circuit entered its Judgment, denying enforcement of the Board's Order and remanding the case to the Board for further proceedings to consider "... the propriety of the certified unit under a standard affording appropriate deference to the mandate of Congress." (2a)

No action has been taken by the Board pursuant to the Second Circuit's remand.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

The central issue in this case is the standard to be applied by the Board in determining the appropriateness of a unit confined to the maintenance and engineering department employees of a health care institution in light of the mandate of Congress that there be no proliferation of bargaining units in the health care industry. The Second, Third and Seventh Circuit Courts of Appeals have addressed this specific issue. Each has held that the standard applied by the Board has conflicted with Congress' direction that there be no fragmentation of bargaining units within the health care field. Accordingly, each Circuit has denied enforcement of Board orders that a hospital bargain in a unit confined to maintenance and engineering employees.

Not only is there no conflict between the various circuit courts, there is in fact unanimity. Under such circumstances, review by the Court is neither necessary nor warranted.[2]

[2] In addition, the Court below remanded the case to the Board for consideration of the propriety of the unit "... under a standard affording appropriate deference to the mandate of Congress" (2a) and for "... an independent evaluation of the factors in this particular hospital." (13a) The Board has never acted pursuant to the remand. In the absence of such action in accordance with the remand, review of the instant case by this Court is premature. *Brotherhood of Locomotive Firemen & Engineermen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967).

ARGUMENT

REVIEW SHOULD NOT BE GRANTED SINCE THE SECOND CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THE VARIOUS COURTS OF APPEALS

In its Petition for a Writ of Certiorari, the Board offers only one basis on which the Petition should be granted. It contends that review should be granted because

> "The court of appeals' decision, together with similar decisions in other circuits, has created considerable confusion regarding the standard the Board should apply in making bargaining unit determinations in the health care industry." (Petition, p. 11) (footnote omitted)

Quite the contrary is true. The Second Circuit's decision is fully in accord with the decisions of the Third and Seventh Circuits,[3] each of which has held that a separate maintenance unit is inappropriate under the Congressional mandate. In short, all of the circuit courts who have addressed the question are in agreement. Moreover, if indeed any confusion exists, it is attributable to the Board's radical "about-face" on the issue of the appropriateness of separate maintenance units.

At the time that Congress was considering the amendments to the Act bringing non-profit hospitals under the jurisdiction of the Board, it was seriously concerned about the stability of labor relations in this unique field. Its objective was to minimize the disruption and interruption of the care of the sick.

[3] *Allegheny General Hospital v. N.L.R.B.*, 239 N.L.R.B. No. 104 (1978), *enforcement denied*, 608 F.2d 965 (3rd Cir. 1979); *St. Vincent's Hospital v. N.L.R.B.*, 567 F.2d 588 (3rd Cir. 1977); *West Suburban Hospital v. N.L.R.B.*, 570 F.2d 213 (7th Cir. 1978); *Mary Thompson Hospital v. N.L.R.B.*, 242 N.L.R.B. No. 83 (1979) *enforcement denied,* . F.2d , (7th Cir. No. 79-1374, March 5, 1980, *BNA Daily Labor Report,* March 18, 1980, pp. D-1 through D-4).

With this objective in mind, Congress addressed itself to the question of bargaining units in the hospital industry. Senator William Taft of Ohio stated:

> "The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care."[4]

During the Congressional debates, there were extensive discussions with respect to the manner in which the Board was to implement this policy of non-proliferation. Senator Taft introduced a bill which would have restricted the Board's unit determinations in hospital cases by limiting hospital bargaining units to four types (service and maintenance, technical, clerical and professional). (S. 2229, 93rd Cong., 1st Sess.) This approach was rejected, and Congress decided to leave to the Board its statutory role of making unit determinations. This concession to the Board, however, was not without its restrictions. Senator Taft stated:

> "I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented." (Legis. Hist., *supra,* at 113)

Congress made clear in enacting the amendments that while the Board retained the authority to make unit determina-

[4] "Legislative History of the Coverage of Non-Profit Hospitals under the National Labor Relations Act 1974" ("Legis. Hist."), S. Rep. No. 93-766 (1974) 93rd Cong., 2d Sess. 5 at 113.

tions in the health care industry, it was to do so in accordance with the explicit expression of Congressional policy to avoid proliferation of bargaining units. The House and Senate Reports[5] contained the following statement:

> "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center,* 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital,* 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia,* 203 NLRB No. 170, 83 LRRM 1242 (1973).[1]

"[1]By our reference to *Extendicare,* we do not necessarily approve all of the holdings of that decision."

Following the amendments, the Board grappled with the delicate and sensitive issues surrounding hospital bargaining units. The lead case on the issue of separate maintenance units, *Shriners Hospitals,* 217 NLRB 806 (1975), contains a searching analysis of the standard that the Board would utilize in addressing itself to this issue. The Board stated:

> "We are mindful that, under ordinary circumstances, units similar to the one requested here have been found appropriate in other industries, but ordinary circumstances do not exist here.... Congress recognized that labor relations in the health care industry require special considerations due to the uniqueness of that industry in terms of the service it provides to the sick, infirm, or aged. It is in the context of the peculiar nature of the industry and the Congressional mandate against the proliferation of bargaining units that we have weighed all of the criteria traditionally considered when making a unit determination and have, on balance, concluded that it is proper to place

[5] Legis. Hist., S. Rep., *supra,* at 12; H. Rep. No. 93-1501, 93rd Cong., 2d Sess. 6-7 (1974) at 274-275.

special significance on the high degree of integration of operations performed throughout a health facility." *Id.* at 808

The Board later retreated somewhat from this position in *Jewish Hospital of Cincinnati,* 223 NLRB 614 (1976). Again rejecting as inappropriate a separate maintenance unit, the Board noted that "... the desire for non-proliferation does not, in our judgment, necessarily preclude our granting maintenance units in the health care area." *Id.* at 616.

Addressing the question whether the employees in the unit sought in that case possessed a sufficiently separate community of interest to warrant a separate unit, the Board concluded that they did not and stated:

> "However, hospitals are composed of a number of departments each of which, in a general sense, could be said to be made up of skilled employees performing duties which are functionally distinct. The real question is whether the distinction between engineering department employees and the employees in other departments show such separate interests as to warrant granting engineering department employees a separate unit while not permitting skilled employees in other departments the same privilege." *Id.* at 617

On the same day that *Jewish Hospital* was decided, the Board found appropriate a unit confined to a hospital's boiler operators. *St. Vincent's Hospital,* 223 NLRB 638 (1976), *enforcement denied, St. Vincent's Hospital v. N.L.R.B.,* 567 F.2d 588 (3rd Cir. 1977). This case signalled the beginning of the change in the Board's approach to separate maintenance units. Two months later, the Board found appropriate a unit comprised of a hospital's maintenance department employees. Over the strong dissent of two of its members, the Board concluded that the department constituted "... a distinct and homogenous unit whose employees share a community of interest." *West*

Suburban Hospital 224 NLRB 1349, 1351 (1976), *enforcement denied, N.L.R.B. v. West Suburban Hospital* 570 F.2d 213 (7th Cir. 1978). The Board did not even attempt to distinguish its earlier decision in *Jewish Hospital;* nor did it discuss its departure from the standard it had set for itself in *Shriners Hospitals* and *Jewish Hospital.*

In late 1977, the Court of Appeals for the Third Circuit denied the Board's application for enforcement in the *St. Vincent's Hospital* case. The Court particularly criticized the Board for utilizing its "traditional criteria" in making unit determinations in the health care field. It stated:

> "... Congress directed the Board to apply a standard in this field that was not traditional.... The Board therefore should recognize that the contours of a bargaining unit in other industries does not follow the blueprint Congress desired in a hospital." 567 F.2d at 592.

The Court then undertook to outline for the Board what the Congressional mandate meant.

> "Similarly, the factors of the amount of contact between workers, separate immediate supervision and the special skills of certain crafts must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with the Congressional intent to treat this unique field in a special manner." *Id.*

The Board's "mechanical reliance" on traditional factors was similarly subjected to criticism in the Seventh Circuit's decision in *West Suburban Hospital, supra.* The Court found that the Board's decision violated the Congressional admonition and criticized "... the Board's mere lip-service mention of the Congressional admonition as a factor to be taken into account, without any indication from the Board as to a manner in which its unit determination in this case implemented or reflected that admonition." 570 F.2d at 216.

In December, 1978, the Board decided to reconsider its earlier decision in *Allegheny General Hospital, supra,* in light of the decisions of the Third Circuit in *St. Vincent's Hospital, supra,* and *Memorial Hospital of Roxborough,* 545 F.2d 351 (3rd Cir. 1976). The Board stated that, after a review of the legislative history, it had concluded that Congress had not intended to prohibit the Board from finding separate maintenance and engineering units appropriate. It also noted that it disagreed with the Third Circuit's conclusion in *St. Vincent's Hospital* that the Board was precluded from relying on its traditional criteria in making health care unit determinations. *Allegheny General Hospital,* 239 NLRB No. 104.

The Board stated that its analysis of the legislative history had led the Board to conclude that Congress had intended that the Board utilize its traditional community of interest criteria, i.e., similarity of wages and hours, extent of common supervision, frequency of contact, degree of interchange and functional integration, and area practice. With respect to the Congressional admonition against the proliferation of hospital bargaining units, the Board stated that Congress intended "... that the Board should consider proliferation *as a factor* in making unit determinations in the health care industry and that it was not necessary to amend Section 9(b) in order for the Board to do so." 239 NLRB No. 104 (Slip opinion p. 7) (emphasis supplied) The Board then proceeded to announce, over the strong dissent of member Penello, that it would apply the tests of *American Cyanamid Co.,* 131 NLRB 909 (1961) to determine the appropriateness of maintenance units in the health care industry. *Id.* at p. 21[6]

The Board's defense of its position was rejected by the Second Circuit in the instant case. Noting that the Board had adopted the Regional Director's opinion "without further elaboration" (12a), the Court stated:

> "Our reading of the legislative history leads us to conclude that in the 1974 amendment Congress was

[6] *American Cyanamid* is the lead Board case with respect to the appropriateness of separate maintenance units in an industrial setting.

> expressing concern not only that health care institutions be spared the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria could also impede effective delivery of health care services. Thus, we hold along with our sister circuits that when the Board makes a unit determination for health care institution employees, traditional community of interest factors 'must be put in balance against the public interest in preventing fragmentation in the health care field.' " 11a (citations omitted)

The Board's position was similarly rejected by the Third Circuit when it reviewed the Board's order in *Allegheny General Hospital v. N.L.R.B., supra.* In refusing to overrule its earlier decisions in *Memorial Hospital of Roxborough v. N.L.R.B., supra,* and *St. Vincent's Hospital v. N.L.R.B., supra,* the Court stated:

> "We have no intention of reappraising the determinations of two relatively recent decisions of this court, especially when the Board has failed to cite subsequent events that would render those decisions no longer tenable. Indeed, since these decisions two other circuits have expressly relied on them in reviewing orders of the NLRB. The United States Courts of Appeals for the Second and Seventh Circuits have recently refused to enforce Board orders that were based on use of traditional bargaining unit standards to determine hospital bargaining units. *NLRB v. Mercy Hospital Assoc.,* 606 F.2d 22, at 26-28 (2d Cir. 1979); *NLRB v. West Suburban Hospital,* 570 F.2d 213, 216 (7th Cir. 1978). . . . Instead of reappraising determinations that have been endorsed by our sister circuits, we must reaffirm certain fundamental tenets of the doctrine of *stare decisis* and thus reassert the power of the federal judiciary to interpret statutes enacted by Congress. 608 F.2d at 969

Just recently, the Seventh Circuit denied enforcement to a Board order requiring a hospital to bargain in a unit restricted to four stationary engineers. *Mary Thompson Hospital v.*

N.L.R.B., F.2d (7th Cir. No. 79-1374, March 5, 1980, *BNA Daily Labor Report,* March 18, 1980, pp. D-1 through 4). The Court criticized the Board for its "flagrant disregard of judicial precedent" *Id.* at D-3 and took the occasion to remind the Board that:

> "... we must look to decisions by courts of appeals — not to decisions by the Board — in determining how properly to consider the congressional admonition. As a review of the relevant cases will show, *courts of appeals have consistently rejected a strict reliance on a traditional community of interest analysis in a hospital setting." Id.* at D-2 (emphasis supplied)

The various decisions of the Second, Third and Seventh Circuits[7] leave no room for doubt or uncertainty on the question of the propriety of a unit determination which sanctions the placement of maintenance employees in a small and separate grouping. The circuits all agree that such a unit determination is impermissible under the policy enunciated by Congress in amending the Act. There is no conflict to be resolved by this

[7] The Ninth Circuit has also addressed itself to the issue of the standard that the Board must apply in making health care unit determinations. *N.L.R.B v. St. Francis Hospital of Lynwood,* 601 F.2d 404 (9th Cir. 1979). In denying enforcement to a Board order requiring the hospital to bargain in a unit confined to registered nurses, the Court stated: "From the legislative history of the 1974 Amendments to the Act, it is apparent that Congress sought to encourage the Board to find broader bargaining units in the health care industry rather than narrower ones." *Id.* at 414 The Court then went on to declare:

> "We view the language and the remaining legislative history of the 1974 Amendments to the Act as requiring the Board to determine not the similarities among employees in the same job classification (indeed the fact that they share the same classification would inevitably lead to the discovery of many similarities), but instead the 'disparity of interests' among employee classifications which would prevent a combination of groups of employees into a single broader unit thereby minimizing unit proliferation. The congressional approval of the trend toward broader units in the health care industry indicates an awareness that the traditional factor of community of interest would be subordinated to the directive against undue proliferation." *Id.* at 419

Court. There are no ambiguities or inconsistencies to be clarified by this Court. The Board's sole basis for seeking review, the purported "confusion regarding the standard the Board should apply in making bargaining unit determinations in the health care industry" (Petition, p. 11) is simply the Board's way of saying that it disagrees with the decisions of the circuit courts. In light of the unanimous agreement among the circuits on the standard to be applied by the Board, intervention by this Court is not now necessary.

CONCLUSION

In view of the fact that the Board has failed to establish any basis for review under Rule 19 of the Rules of this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

MERCY HOSPITAL ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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REPLY MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

---

1. Respondent contends (Br. in Opp. 4 n.2) that, since the court below remanded the case to the Board for consideration of the propriety of the bargaining unit " 'under a standard affording appropriate deference to the mandate of Congress' " and since the Board has not acted pursuant to the remand, "review of the instant case by this Court is premature." There is no merit to this contention. The basic question is whether Congress intended to permit the Board to apply traditional community of interest criteria in determining bargaining units in the health care industry provided that they did not result in an undue proliferation of units (as the Board concluded), or whether it intended the Board to apply more restrictive criteria (as the court below concluded). This difference over the appropriate standard to be applied in establishing bargaining units in the health care industry is ripe for resolution now, for resolution does not require

any additional factual findings but merely a determination as to Congress' intent in enacting the health care amendments to the National Labor Relations Act.[1] Acceptance of the remand could thus serve no useful purpose in this case. On the other hand, a prompt resolution of the question as to the appropriate standard for the establishment of bargaining units in the health care industry would not only be beneficial to the parties in this case, but would also aid in reducing the heavy volume of litigation on this issue which has been occurring (see Pet. 11 nn. 8 & 9).

2. Respondent does not deny that the question of the appropriate standard to be applied in determining bargaining units in the health care industry is an important one in the administration of the National Labor Relations Act. Respondent's principal ground for opposing the petition is that the three circuits[2] which have thus far had occasion to consider the question have disagreed with the Board. However, since, as we have shown in the petition (pages 12-20), there is at least a substantial doubt as to the correctness of the courts' reading of the legislative history of the health care amendments to the Act, the absence of

[1] *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967), is distinguishable. There, unlike here, the legal issue (*i.e.*, whether there was a contempt of a restraining order) turned upon the ascertainment of additional facts (*i.e.*, whether the arbitration award had lapsed when the strike commenced). But, where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." R. Stern & E. Gressman, *Supreme Court Practice* 301 (5th ed. 1978).

[2] In addition to the decision herein, see *Allegheny General Hospital* v. *NLRB*, 608 F. 2d 965 (3d Cir. 1979); *NLRB* v. *West Suburban Hospital*, 570 F. 2d 213 (7th Cir. 1978); *Mary Thompson Hospital, Inc.* v. *NLRB*, No. 79-1374 (7th Cir. Mar. 5, 1980), 103 L.R.R.M. 2739.

a conflict of decisions should not militate against granting of the Board's petition in this case. As Chief Judge Fairchild stated, in dissenting, in *Mary Thompson Hospital*, *supra* (103 L.R.R.M. at 2743):

> The "admonition" [in the Committee Reports about avoiding an undue proliferation of units] is not part of the statute. Nor was there any change in the portion of the statute governing the Board's choice of an appropriate unit, so that the "admonition" would be helpful in interpreting the change.
>
> Under the circumstances, the "admonition" and the Board's response to it seem to be a matter between the Board and Congress. If the Board may be thought by members of Congress to pay insufficient heed to the "admonition," the Board may be courting a statutory change. But it seems to me that the "admonition" is not appropriate for application by the courts in deciding whether an order of the Board conforms to the statute or whether the Board has abused the discretion conferred on it by statute.

For these reasons as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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APRIL 1980

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MERCY HOSPITAL ASSOCIATION

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO INTERVENE

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Supreme Court of the United States

October Term, 1979

No. 79-1197

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

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Local Union No. 30, International Union of Operating Engineers, AFL-CIO (hereinafter the "Union"), respectfully moves to intervene in this case on the side of the petitioner, National Labor Relations Board. In support of this motion, the Union states as follows:

1. The Union is the original petitioner in the representation proceedings before the National Labor Relations Board (hereinafter the "Board"), which proceedings resulted in the Union being certified by the Board as collective bargaining representative of the affected employees. Moreover, the Union was the charging party in the unfair labor practice proceedings before the Board, in which the Mercy Hospital Association was found guilty of an unlawful refusal to bargain. That finding was reversed by the Second Circuit Court of Appeals in the decision below.

2. In the Circuit Court proceeding below, the Union, based on its view that the appropriate unit issue was of a routine nature in light of the Board's treatment of similar cases, did not seek to intervene. Upon issuance of the Circuit's decision, however, the Union moved to intervene solely to participate in further proceedings in this Court. That post-judgment motion was denied. The Union therefore seeks this opportunity to defend, as a party, its interests here.

3. Subsequent to the decision below, the Second Circuit issued an order remanding to the Board another case, in which the Union is a party and which presents the identical issue presented here, for reconsideration consistent with its decision in this case. *Yonkers General Hospital v. NLRB*, 2nd Cir. No. 79-4124 (Order entered January 17, 1980). The Union's interest in this case has been, thus, further intensified.

4. On March 31, 1980, Mr. Justice Brennan signed an order granting an extension of time within which to file a petition for a writ of certiorari in response to an application filed by the Solicitor General in *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3rd Cir. 1980). In his application, the Solicitor General states that the issue in *Allegheny* is the same as that presented in the instant case, and that a petition for a writ of certiorari may be filed in *Allegheny* depending upon the Court's disposition of the petition for a writ of certiorari in this case. It would thus appear that the issue presented here embodies an important question of federal labor law which has not been, but should be, resolved by this Court. Such a critical determination requires the full participation of all the affected parties.

5. Identical motions to intervene have been granted in two other health-care industry cases: *Beth Israel Hospital v. NLRB*, 425 U.S. 940 (1978) and *Baptist Hospital, Inc. v. NLRB*, 422 U.S. 773 (1979). See also *NLRB v. Acme Industrial Co.*, 384 U.S. 925 (subsequently decided at 385 U.S. 421); *Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (subsequently decided at 390 U.S. 459). As this Court has implicitly recognized in granting the above cited motions to intervene, the sensitive nature of health care industry labor issues requires the fullest participation by all affected parties in order to ensure as thorough and complete an elucidation of the issues as possible.

CONCLUSION

For the foregoing reasons this motion should be granted.

Respectfully submitted,

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